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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

GEORGE ALAN LEWIS,

Petitioner,

v.

JAMES CROSBY, CHARLIE CRIST, ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
LAW OFFICES OF
PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, Florida 33156
(305) 670-1441
Counsel for Petitioner

QUESTIONS PRESENTED

I.

WHETHER THE DECISION OF THE COURT OF APPEALS ON THE ISSUE OF MATERIALITY OF THE EVIDENCE CONCEALED BY THE STATE IN VIOLATION OF *BRADY v. MARYLAND*, 373 U.S. 83 (1963) CONFLICTS WITH *KYLES v. WHITLEY*, 514 U.S. 419 (1995) BY WEIGHING THE PROSECUTION'S AND PETITIONER'S TRIAL EVIDENCE RATHER THAN DETERMINING WHETHER THE *BRADY* VIOLATIONS UNDERMINED CONFIDENCE IN THE OUTCOME OF THE TRIAL.

II.

IN *BANKS v. DRETKE*, 540 U.S. 668, 690 n.11 (2004), THIS COURT EXPRESSLY LEFT OPEN THE QUESTION WHETHER A CLAIM PURSUANT TO *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972), TO WARRANT ADJUDICATION, MUST BE SEPARATELY PLED FROM A CLAIM PURSUANT TO *BRADY v. MARYLAND*, 373 U.S. 83 (1963).

THE QUESTION PRESENTED IN THIS CASE IS WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER'S FEDERAL HABEAS CORPUS CLAIMS UNDER *GIGLIO* WERE PROCEDURALLY BARRED AS NOT HAVING BEEN EXHAUSTED IN THE STATE COURTS SEPARATELY FROM HIS *BRADY* CLAIMS.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Lewis v. Crosby*, 107 Fed.Appx. 892, 2004 WL 1347034 (11th Cir.June 9, 2004), which affirmed the judgment denying habeas corpus relief entered by the United States District Court for the Middle District of Florida, is contained in the Appendix. (App. A).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on June 9, 2004. (App. A). On October 27, 2004, the Eleventh Circuit entered an order denying the petitioner's timely filed petition for rehearing and rehearing. (App. B). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to February 28, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner is a Florida state prisoner serving a life sentence for murder and rape. The petitioner filed a federal petition for writ of habeas corpus seeking relief based upon the prosecution's violations of *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The petitioner claimed that the State concealed voluminous evidence, uncovered by the petitioner after his trial, supporting his defense that the murder and rape were committed by one Peter Kumble, a witness for the prosecution.

At the petitioner's state jury trial, the prosecution contended that the petitioner was guilty because his bare footprint was found at the crime scene. The prosecution also argued that the petitioner's inconsistent statements to the authorities were evidence of his guilt. To rebut Kumble's guilt, the prosecution presented testimony that during the police investigation, unlike the petitioner, Kumble never made any inconsistent statements. (App. C at 5-6).

At the trial, the prosecution successfully contended in the presence of the jury that the petitioner lacked evidence to

accuse Kumble. The following took place when the petitioner's counsel sought to cross-examine Kumble about his guilt:

> PETITIONER'S COUNSEL: Isn't it a fact, sir, that on Tuesday evening, you and Mr. Kuhar [Kumble's roommate] were out for the evening and you went by the Mackey residence [the crime scene]?
> KUMBLE: No, that's not a fact.
> PETITIONER'S COUNSEL: You stopped there to see Ms. Gregory [the victim]. You made advances. She became angry with you, and you killed her.
> KUMBLE: No, sir.
> PROSECUTOR: Excuse me a second. I want -- that's improper for this lawyer to ask a question that he has absolutely no good faith basis to put that on before this jury. And that's why I want the Court to instruct that jury to disregard that question.
> THE COURT: Sustained. Ladies and gentlemen, you should disregard the last statement by counsel.

(App. C at 6). Consequently, the petitioner's defense was effectively limited to his own testimony and the testimony of his wife.

The petitioner testified that at the time in question, he lived with his wife across the street from the house of the victim's boyfriend where the murder and rape took place. The petitioner did not know the victim. On the evening of the murder and rape, he was in his garage welding a bumper for a lieutenant in the fire department where the petitioner was employed as a firefighter. The petitioner had just finished the welding and removed his boots when he heard a scream. He opened the garage door, turned off the garage light, looked around, and observed someone standing near the house where the murder took place. The petitioner asked if anything was wrong. The stranger told the petitioner to mind his own business and leave. The stranger walked away. (App. C at 7).

The petitioner walked toward the house and observed broken glass on the sidewalk. The petitioner knocked on the front door and there was no answer. Believing something was wrong, he went around the house where there was one back window with the shades open. He crawled through the

window and observed the victim. The gruesome scene caused him to walk to the bathroom and vomit. The petitioner did not call the police because he was terrified that his presence at the scene would make him a suspect and the authorities would not believe that he entered the window out of curiosity. He returned home.(App. C at 7-8).

The petitioner described the stranger to the police and a composite drawing was created. The petitioner was later shown a photograph and said: "[T]hat's him." The photograph was of Kuhar, the roommate of Kumble. As it turned out, Kuhar was Kumble's sole alibi for the night of the murder. (App. C at 8).

The petitioner's wife testified that she was awakened by the scream, looked outside, but saw nothing. She saw that the garage light was off and the garage door open. She sat in the kitchen next to the window. Right outside the window was the hose which she did not hear, but would have. (The prosecution speculated that the petitioner had turned it on to hose off blood.) She waited for the petitioner. About ten minutes passed and he came in looking pale. However, there was nothing else unusual about his appearance. The petitioner told her that he heard the scream as well. He said he would lock up and put away his tools. They went to bed. (App. C at 9). The wife confirmed that afterward, the petitioner put up floodlights, adopted a large dog, installed a telephone in the bedroom, and traded cars with her so that anyone watching the house would think someone was home and not know their routines. (App C at 9).

The jury deliberated more than two days. The petitioner was found guilty as charged. The prosecution sought the death penalty. The jury unanimously recommended life imprisonment. (App C at 10).

The presiding state trial judge ordered a new trial on the murder charge, finding that "this was a close case" and that the cumulative effect of several errors required a new trial. (App C at 10). The trial judge also entered a judgment of acquittal on the rape charge based upon legal insufficiency of the prosecution's evidence. *Id.*

The State appealed and the Florida appellate court reversed. *State v. Lewis*, 543 So. 2d 760 (Fla.2d DCA 1989) [*Lewis I*]. The cause was remanded for reinstatement of the convictions and sentencing on both charges. *Lewis I*. The petitioner was sentenced to life imprisonment for first degree

murder and 12 years for rape. The Florida appellate court affirmed the convictions and sentences. *Lewis v. State*, 566 So. 2d 270 (Fla.2d DCA 1990) [*Lewis II*].

The petitioner's trial counsel made a public records request and received voluminous records containing evidence never disclosed to the defense by the prosecution. The concealed evidence included numerous inconsistent statements made by Kumble to the authorities. The concealed evidence also established that Kumble voiced his knowledge that the victim had been raped before that fact had been released to the public. The petitioner filed his State habeas action alleging the foregoing *Brady* violations, and others, as follows:

• The State suppressed a sworn statement taken from Maureen Byrnes by two prosecutors. Byrnes stated that Kumble telephoned her and said he had just spoken with an officer at the crime scene. Byrnes testified as follows in her suppressed pretrial statement:

> [Kumble] told me that -- I believe he asked me -- he said, do you remember Karen [Gregory], and I said yeah, sort of, know, like oh, wait a second, okay. And he said -- he was very serious. His voice was real serious, and he said, well, **she was RAPED and killed**, and that caught my attention. I thought he was just originally going to just -- to tell me about somebody. And I either asked him or he told me, how did you find out about that, and he said he had just gotten off the phone with the police -- Gulfport Police.

(App C at 11) (emphasis supplied). Because Kumble had not been told by the police that the victim had also been raped, *id.*, Kumble's statement was material to his guilt and the petitioner's innocence;

• The State concealed a 22-page Supplemental Report of Detective Brinkworth [Brinkworth's Report] (App. C at 11-14) which revealed witnesses who would have testified that Kumble had a romantic interest in the victim (which he denied at the petitioner's trial).Also concealed was an interview with Kumble where he was described by the officers as a "prime suspect" and with good cause -- Kumble missed teaching his yoga class on the night of the murder when he otherwise had an "impeccable" attendance record

-- a fact also concealed by the State;

• The State concealed Kumble's many inconsistent statements to the police which were evidenced in the interview. *Id.*;

• After the crimes, Kumble met with a detective who looked at Kumble's right hand and observed a fresh large scratch. The detective reported that at that moment, Kumble moved his hand off the table. (App. C at 4). During the investigation, Kumble was asked on separate occasions about the scratches on his hands. Kumble told one detective that the wounds were from playing with his dog. But he told another that the wounds were from working on his car. *Id.* The interview concluded: "[F]ollow up and investigative methods should be used in the pursuit and further investigation of a Peter A. Kumble, prime suspect at this point in the investigation..." . (App. C at 13-14);

• The prosecution concealed a memorandum which indicated that four bags of evidence seized from the crime scene were opened without authorization, deemed contaminated, and therefore not subjected to forensic analysis (App. C at 14) that would have explained why Kumble's presence at the scene was not forensically established.

A successor state judge presided over an evidentiary hearing on the petitioner's claims. The successor judge ruled that the prosecutors violated *Brady*. However, the judge denied relief primarily on the ground of lack of materiality of the concealed evidence. (App. C at 15-16).

The petitioner appealed. With regard to the prosecutor's successful objection to the above-quoted cross-examination of Kumble, the petitioner argued the following in his brief:

> It is undeniable that the *Brady* evidence discovered from the public records request would have given the defense exactly what it needed to present Kumble as a viable suspect to the jury. In the absence of this evidence, the State's objection to that tactic was sustained by the trial court, effectively crippling that aspect of the defense.

(App. D at 1).

The Florida reviewing court affirmed, but referred the prosecutors to investigation by the Florida Bar for discipline due to their violations of *Brady*. *Lewis v. State*, 714 So. 2d 1201 (Fla.2d DCA 1998) [*Lewis III*]. The petitioner sought and was denied review of his federal constitutional claims in the Supreme Court of Florida. *Lewis v. State*, 728 So. 2d 203 (Fla.1998) [*Lewis IV*].

The petitioner timely filed in the United States District Court for the Middle District of Florida a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 seeking relief for the violations of *Brady* and *Giglio*. (D1). The petitioner argued, in pertinent part, that the state habeas judge applied the wrong standards for determining materiality of the *Brady* violations and failed to conduct a collective analysis of the concealed evidence, thereby warranting federal habeas corpus relief under the Antiterrorism and Effective Death Penalty Act of 1966 [AEDPA]. See 28 U.S.C. § 2254(d)(1), (2).

The petitioner also argued that on at least three occasions, the prosecution violated *Giglio* which holds that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Id.* at 153, 92 S.Ct. at 766. First, not only were the jurors deprived of the suppressed evidence against Kumble in violation of *Brady*, the presiding trial judge sustained the prosecution's objection that the petitioner's counsel lacked a good faith basis for accusing Kumble of the crimes and instructed the jurors to "disregard the last statement by [petitioner's] counsel" (App C at 6, 36). Thus, the jurors were, in effect, instructed by the trial judge, and misled by the prosecutor to believe, that the petitioner's counsel acted in bad faith when he sought to ask Kumble whether he was the murderer. The prosecution, of course, knew better because it was possessed of all the suppressed evidence against Kumble which provided a good faith basis for the accusation.

Second, during pretrial depositions by the defense, the evidence analysts for the State were asked by petitioner's counsel why debris collected from the murder scene was not analyzed. The deponents withheld the correct answer, namely, that the evidence had been contaminated. The prosecutor who was present at the deposition failed to correct the misleading and incorrect answers, even though

she drafted the suppressed memorandum detailing the contamination. (App. C at 36).

Third, at the petitioner's trial, the prosecution sought to "exonerate" Kumble as the murderer and rapist by asking a lead detective (Tosi) if Kumble gave any inconsistent statements to the police:

> PROSECUTOR: Did Mr. Kumble ever give you or any other law enforcement officers that you used specifically in this investigation an inconsistent statement?
> DETECTIVE TOSI: None.

(App. C at 36-37).

The United States District Judge summarily denied relief in a written order that adopted nearly verbatim the written order of the State habeas judge. On appeal, the Court of Appeals affirmed. (App. A). The Court of Appeals ruled that the evidence concealed by the prosecutors in violation of *Brady* was not material because the petitioner's footprint at the scene "coupled with his failure to explain the footprint in any logical or consistent way, suffices to indicate the withheld evidence, if properly disclosed, would not have resulted in a markedly weaker case for the State or a markedly stronger one for [him]." (App. A at 2).

The Court of Appeals further found that the petitioner's *Giglio* claims were procedurally barred on the ground that they were not raised in the Florida courts and therefore not exhausted. (App. A at 3).

The Court of Appeals noted that the Florida reviewing court referred the prosecutors to the Florida Bar for their violations of *Brady* where "the prosecution's obligation to disclose evidence is greater under professional responsibility standards than under constitutional standards." (App. A at 2).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals applied the wrong standard for determining the materiality of the evidence suppressed by the prosecution. In conflict with *Kyles*, the Court of Appeals weighed the sufficiency of the prosecution's evidence to reach the conclusion that the concealed evidence did not weaken the prosecution's case or strengthen the defense. Review is warranted due to the legal importance of the case as evidenced by the conflicts with *Kyles*.

Review is warranted for several additional reasons. First, there is strong reason to believe that the concealment of the exculpatory evidence was prejudicial. Indeed, even before the concealment was discovered, the presiding trial judge, ruling that this was a "close case,"granted a post-verdict motion for new trial on the murder charge (due to various errors) and ordered a judgment of acquittal on the rape charge due to legally insufficient evidence. Second, "cases in which the record reveals so many instances of the state's failure to disclose exculpatory evidence are extremely rare." *Kyles*, 514 U.S. at 455 (Stevens, J., concurring) (noting this as one of three reasons why the *Kyles* case merited favored treatment). Third, as the trial judge's ruling shows, even before the *Brady* violations were known, there is a "degree of doubt about petitioner's guilt ...", *id.*, that is dramatically heightened when the concealed exculpatory evidence is considered.

II.

In *Banks v. Dretke*, 540 U.S. 668, 690 n.11 (2004), this Court expressly left open the question "whether a *Giglio* claim, to warrant adjudication, must be separately pleaded [from a *Brady* claim]." *Banks* suggests that this Court's decisions in *United States v. Bagley*, 474 U.S. 667 (1985) and *United States v. Agurs*, 427 U.S. 97 (1976) answer the question in the negative.

This case presents the same important question. However, contrary to *Bagley* and *Agurs*, the Court of Appeals ruled that the petitioner's *Giglio* claims were procedurally barred under the exhaustion doctrine because the claims

were not separately pled from the *Brady* claims pled in the state courts.

This Court is respectfully requested to resolve this important legal question.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS ON THE ISSUE OF MATERIALITY OF THE EVIDENCE CONCEALED BY THE STATE IN VIOLATION OF *BRADY v. MARYLAND*, 373 U.S. 83 (1963) CONFLICTS WITH *KYLES v. WHITLEY*, 514 U.S. 419 (1995) BY WEIGHING THE PROSECUTION'S AND PETITIONER'S TRIAL EVIDENCE RATHER THAN DETERMINING WHETHER THE *BRADY* VIOLATIONS UNDERMINED CONFIDENCE IN THE OUTCOME OF THE TRIAL.

In *Brady*, this Court held that the "...suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87, 83 S.Ct. at 1196-97. The rationale of the rule of *Brady* is

> not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty ... casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice....

373 U.S. at 87-88, 83 S.Ct. at 1197.

Since *Brady*, this Court has elaborated upon the issue of "materiality." See, *e.g.*, *Bagley*, *supra*. In *Kyles*, this Court explained that the focus is upon the fairness of the trial the accused received rather than whether a different result would have occurred had the prosecution revealed the suppressed evidence:

> [A] showing of materiality does NOT require demonstration by a preponderance that disclosure of the suppressed evidence

> would have resulted ultimately in the defendant's acquittal.... *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question [under *Brady*] is not whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434, 115 S.Ct. at 1566 (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381) (citations omitted) (e.s.). This Court also stated that no *Brady/Kyles/Bagley* error can ever be harmless because a reasonable probability of a different result "necessarily entails the conclusion that the suppression must have had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*

In determining materiality, four factors have emerged. First, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566). "Thus, undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence would still convict." *Id.* Second, "a defendant need not show there was insufficient evidence to convict in view of the suppressed evidence." *Id.* Third, "there is no harmless error review of *Bagley* errors." *Id.* Fourth, "materiality is to be determined collectively, not item-by-item." *Id.*

In the case at bar, the decision of the Court of Appeals conflicts with the above standards governing materiality. The Court of Appeals reasoned that the petitioner's "bloody footprint found at the murder scene, coupled with his failure to explain the footprint in any logical or consistent way, suffices to indicate the withheld evidence, if properly disclosed, would not have resulted in a markedly weaker

case for the State or a markedly stronger one for [the petitioner]." (App. C at 2). In so reasoning, the Court of Appeals engaged in a sufficiency-of-the-prosecution's-evidence-analysis which *Kyles* clearly prohibits as a factor for determining the materiality of evidence concealed by the prosecution in violation of *Brady*. See *Kyles*, 514 U.S. at 434. Consequently, the determination of materiality must not turn upon a reviewing court's evaluation of the "logic" or "consistency" of an accused's trial testimony. Such a standard of review also impermissibly substitutes the judgment of the reviewing court for that of a jury on an issue of credibility and on a cold record. Furthermore, *Kyles* holds that the test for materiality is whether the accused received an unfair trial in the absence of the suppressed evidence, meaning a trial which did not result in a verdict worthy of confidence. *Id.* That test was not applied here. The petitioner met the *Kyles* test because the concealed evidence would have allowed a reasonable jury to harbor reasonable doubts about his guilt and in fact conclude that Kumble was the perpetrator.

The reasoning of the Court of Appeals also conflicts with this Court's holding test that a petitioner is entitled to a new trial "even if it is more likely than not that a jury seeing the new evidence would still convict." *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566. That test was met by the petitioner upon the showing that the State concealed from him the following evidence: Kumble's statement that the victim had also been raped when the police had not disclosed that fact (which obviously and compellingly supported the defense theory that Kumble was the murderer and rapist); Kumble's concealment from the police of his statement to witness Byrnes that the victim had been raped; Kumble's concealment of his supposed dinner date with the victim, along with a witness's statement that the victim "did not in any way have any intentions of any type of a dinner meeting;"Kumble's statement to the police that the scene house seemed "out of character" and he saw broken glass at the scene, which directly impeached his trial testimony that there was nothing unusual at the scene; Kumble's statement to the police that he did not teach his yoga class the night of the murder, which contradicted his trial testimony suggesting that he might have taught the class that night; Kumble's statement to the police that he knew the victim's boyfriend

was out of town which impeached his trial testimony that he was invited for dinner by both the victim and her boyfriend; Kumble's statements indicating his romantic desire for and interest in the victim, which impeached his trial testimony that he had no interest in her and was not attracted to her; Kumble's inconsistencies about the wounds to his hands and his attempt to hide the wounds from the police; and Kumble's statements to various acquaintances that the victim had affairs and set herself up to be murdered. Any of the concealed evidence would support federal habeas corpus relief. When the concealed evidence is collectively analyzed, the right to relief cannot be reasonably disputed.

The voluminous *Brady* violations in this case can only be remedied with a new trial where the petitioner will have the benefit of defending with the previously suppressed evidence. The Court of Appeals deemed it noteworthy that the Florida reviewing court referred the prosecutors to the Florida Bar for discipline. That "remedy" does nothing for the accused whose constitutional right to a fair trial has been denied.

Even without the evidence suppressed by the prosecution, the presiding state trial judge found sufficient grounds to lack confidence in the jury's verdict. The judge set aside the verdict in what he expressly found was a "close case" and due to errors he perceived. Such findings by the presiding trial judge carry constitutional significance. See *Agurs,* 427 U.S. at 114 (state trial judge's determination of *Brady* violation "in the context of the entire record" was "thorough and entirely reasonable" due in part to the judge's "firsthand appraisal of the record."). By contrast, the result of the State habeas hearing in the petitioner's case, heard by a successor judge, would likely have been different if decided by the presiding trial judge.

As noted, the determination by the Court of Appeals that the suppressed evidence was not material was based in part upon an improper weighing and rejection of the petitioner's explanation of his innocence. But as the Seventh Circuit has noted: "Even innocent people may panic at a police investigation and try to lie their way to safety." *United States v. Myers*, 892 F.2d 642, 649 (7th Cir.1990). Moreover, the petitioner has no criminal background, did not know the victim, and had no motive to kill or rape her. At the very least, the suppressed evidence would have significantly

altered the investigation and preparation of the case by the petitioner's counsel, and consequently the defense heard by the jurors. And at best, the concealed evidence of Kumble's guilt, which has yet to be heard by a jury, could result in acquittal. Accordingly, the constitutional violations were severely prejudicial.

II.

IN *BANKS v. DRETKE*, 540 U.S. 668, 690 n.11 (2004), THIS COURT EXPRESSLY LEFT OPEN THE QUESTION WHETHER A CLAIM PURSUANT TO *GIGLIO v. UNITED STATES*, 405 U.S. 150 (1972), TO WARRANT ADJUDICATION, MUST BE SEPARATELY PLED FROM A CLAIM PURSUANT TO *BRADY v. MARYLAND*, 373 U.S. 83 (1963).

THE QUESTION IN THIS CASE IS WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE PETITIONER'S FEDERAL HABEAS CORPUS CLAIM UNDER *GIGLIO* WAS PROCEDURALLY BARRED AS NOT HAVING BEEN EXHAUSTED IN THE STATE COURTS SEPARATELY FROM HIS *BRADY* CLAIM.

In *Giglio*, this Court held that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Id.* at 153, 92 S.Ct. at 766. A *Giglio* violation can take place even when the deliberate deception by the prosecution or false evidence pertains solely to the credibility of a witness:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible

> interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue v. Illinois, 360 U.S. 264, 269 (1959).

In his federal petition for writ of habeas corpus and before the Court of Appeals, the petitioner argued that the prosecution violated the above principles of law on at least three occasions, each arising from the *Brady* violations First, the presiding trial judge sustained the prosecution's objection that the petitioner's counsel lacked a good faith basis for accusing Kumble of the crimes and instructed the jurors to "disregard the last statement by [petitioner's] counsel" (App. C at 6). Second, during pretrial depositions by the defense, the evidence analysts for the State were asked by petitioner's counsel why debris collected from the murder scene was not analyzed. The deponents withheld the correct answer, namely, that the evidence had been contaminated. The prosecutor who was present at the deposition failed to correct the misleading and incorrect answers, even though she drafted the suppressed memorandum detailing the contamination. (App. C at 36). Third, at the petitioner's trial, the prosecution sought to "exonerate" Kumble as the murderer and rapist by asking a lead detective (Tosi) if Kumble gave any inconsistent statements to the police:

> PROSECUTOR: Did Mr. Kumble ever give you or any other law enforcement officers that you used specifically in this investigation an inconsistent statement?
> DETECTIVE TOSI: None.

(App. C at 36-37). Both the prosecutor and the detective knew the answer was false as established by the suppressed evidence of Kumble's interview. This tactic of the prosecutor and detective was obviously designed to suggest falsely to the jury that Kumble must be innocent because he, unlike the petitioner, made no inconsistent statements.

The Court of Appeals ruled that the petitioner failed to exhaust the above claims because he did not raise them in the Florida courts. (App. A). Consequently, this case presents an important question expressly left open by this Court in *Banks*.

Banks, a state prisoner sentenced to death for murder, sought federal habeas corpus relief based upon the prosecution's concealment of exculpatory evidence involving Robert Farr, a prosecution witness. The Fifth Circuit reversed the federal district court's grant of relief. This Court granted review and held that the Fifth Circuit erred in dismissing Banks' *Brady* claim regarding Farr. In ruling that Banks satisfied the exhaustion requirement as to this *Brady* claim because he alleged in his state-court application for a writ of habeas corpus that the prosecution knowingly failed to disclose exculpatory evidence concerning Farr, this Court noted the following with regard to the *Giglio* issue in the case:

> Banks' federal habeas petition, the Court of Appeals said, stated a claim, only under *Brady*, that material exculpatory or impeachment evidence had been suppressed, not a claim under *Napue* and *Giglio* that the prosecution had filed to correct Farr's false testimony. **In its view, the Court of Appeals explained, a *Brady* claim is distinct from a *Giglio* claim; thus the two did not fit under one umbrella. But cf. *United States v. Bagley*; *United States v. Agurs*.** On brief, the parties debate the issue. Because we conclude that Banks qualifies for relief under *Brady*, **we need not decide whether a *Giglio* claim, to warrant adjudication, must be separately pleaded.** [citations to record and cases omitted; emphasis supplied].

Banks, 540 U.S. at 690 n.11. In the case at bar, the Court of Appeals decided the question left open in *Banks* by ruling that the petitioner's *Giglio* claims were procedurally barred as not having been separately exhausted from his *Brady* claims.

Bagley and *Agurs* call for an opposite result. In *Agurs*, the Court noted that the rule of *Brady* applies in three "quite different situations," all involving the discovery, after trial, of information which had been known to the prosecution but unknown to the defense. *Agurs*, 427 U.S. at 103. The Court cited to *Giglio* in its discussion of the first of the three situations, namely, where undisclosed evidence

demonstrates that the prosecution's case includes perjured testimony that could have affected the judgment of the jury. *Id.*

Similarly in *Bagley*, the Court noted that "the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony." *Bagley*, 473 U.S. at 679 n.8.

The Court of Appeals in the case at bar, contrary to *Brady, Bagley* and *Agurs*, and like the Court of Appeals in *Banks*, treated the petitioner's *Brady* claim as separate and distinct from a *Giglio* claim. Both courts erred. Review is sought to address this important and recurring question.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted

Respectfully submitted,

PAUL MORRIS
Counsel of Record
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33158
(305) 670-1441

Counsel for Petitioner

DATED: February 2005

(3)

No. 041215 FEB 23 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GEORGE ALAN LEWIS,

Petitioner,

v.

JAMES CROSBY, CHARLIE CRIST, ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
LAW OFFICES OF
PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, Florida 33156
(305) 670-1441
Counsel for Petitioner

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
June 9, 2004

THOMAS K. KAHN
CLERK

No. 03-12149

D. C. Docket No. 99-02564 CV-T-26-B

GEORGE ALAN LEWIS

Petitioner-Appellant,

versus

JAMES CROSBY,
CHARLIE CRIST, Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 9, 2004)

Before ANDERSON, CARNES and BRIGHT*, Circuit Judges.

PER CURIAM:

*Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

George Alan Lewis, a Florida prisoner under sentence of life in prison, appeals from the district court's' denial of his petition for the writ of habeas corpus under 28 U.S.C. § 2254. The parties know the facts and procedural history of this case, and other courts have already described the events leading to Lewis' conviction for rape and murder. See Florida v. Lewis,543 So. 2d 760 (Fla. Ct. App. 1989) (first direct appeal); Lewis v. Florida,566 So. 2d 270 (Fla. Ct. App. 1990) (second direct appeal); Lewis v. Florida,714 So. 2d 1201 (Fla. Ct. App. 1998) (collateral appeal). Therefore, we proceed directly to our holding and supporting rationale. After de novo review of the district court's decision, we affirm the denial of Lewis' petition.

Lewis raises three issues on appeal. The first issue concerns whether the Florida state courts unreasonably applied U.S. Supreme Court precedent, see Haliburton v. Sec'y for the Dep't of Corr.,342 F.3d 1233, 1238 (11th Cir. 2003) (standard of review), by holding that prosecutorial misconduct in withholding evidence from the defense did not rise to the level of a Constitutional violation under Brady v. Maryland,373 U.S. 83, 87 (1963). We note that the Florida Court of Appeals, on collateral review, invited bar disciplinary authorities to investigate the prosecutors' failure to disclose the evidence. Lewis v. Florida,714 So. 2d 1201, 1203 (Fla. Ct. App. 1998) (observing that the prosecution's obligation to disclose evidence is greater under professional responsibility standards than under constitutional standards). However, we agree with the district court that the challenged evidence, considered cumulatively, does not meet the Brady materiality standard because no reasonable probability exists that disclosure would have changed the result of the trial. See Kyles v. Whitley,514 U.S. 419, 422 (1995) (standard of review). Lewis' bloody footprint found at the murder scene, coupled with his failure to explain the footprint in any logical or consistent way, suffices to indicate the withheld evidence, if properly disclosed, would not have resulted in a markedly weaker case for the State or a markedly stronger one for Lewis. See United States v. Scheer,168 F.3d 445, 456 (11th Cir. 1999).

Hon. Richard A. Lazzara, United States District Judge for the Middle District of Florida.

The suppressed evidence, if a part of the record, would not diminish a reviewing court's confidence in the result of Lewis' trial. See Kyles, 514 U.S. at 434.

We note that our conclusion on this point renders moot Lewis' second issue, whether the state courts erroneously conducted a piecemeal rather than collective analysis of the alleged Brady evidence. See Kyles,514 U.S. at 436. Assuming, arguendo, that the state courts did not conduct the required collective analysis, their ultimate disposition would not have changed even if they had. As we described above, proper collective analysis still reveals the challenged evidence as not material under Brady.

Lewis' third and final claim on appeal alleges that the state courts unreasonably applied Giglio v. United States,405 U.S. 150, 153 (1972). Lewis asserts that the State violated Giglio by knowingly using perjured testimony (or failing to correct what the prosecutor later learned was false testimony); that the prosecution improperly prevented the defense from suggesting or implying that a third party murdered the victim; that the prosecution permitted a false answer by witnesses describing the State's non-examination of four bags of potentially exculpatory evidence; and finally that the State improperly permitted a detective toverify the integrity of the third party that Lewis contended was the actual murderer.

However, our review of the record reveals that Lewis has never raised theseargumentsin the Florida courts, which consequently have expressed no view on the merits of this issue. Lewis' failure to exhaust this issue procedurally bars us from ordering the writ to be granted on this basis. See Turner v. Crosby,339 F.3d 1247, 1281 (11th Cir. 2003).

Under the highly deferential standards of review employed under 28 U.S.C. § 2254, we conclude that the state courts did not unreasonably apply federal law by holding that the alleged Brady violations did not undermine confidence in the jury's verdict. We do not address the Giglio issue. For these reasons, we affirm the judgment of the district court denying Lewis' petition for habeas corpus.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
Oct. 27 2004
THOMAS K. KAHN
CLERK

FOR THE ELEVENTH CIRCUIT

No. 03-12149-II

GEORGE ALAN LEWIS,

Petitioner-Appellant,

versus

JAMES CROSBY,
CHARLIE CRIST, Attorney
General of the State of Florida,

Respondents-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19 _,F.2d ____).
Before: ANDERSON, CARNES and BRIGHT*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

CASE NO. 03-12149-II

GEORGE ALAN LEWIS,

Appellant,

v.

JAMES CROSBY, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

OPENING BRIEF OF APPELLANT

PAUL MORRIS
Law Offices of
Paul Morris, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
(305) 670-1441

Counsel for George Alan Lewis

CERTIFICATE OF INTERESTED PERSONS

Court of Appeals Docket Number 03-12149-II
Lewis v. Crosby

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Bevery Andringa, Esq.
Joseph Ciarciaglino, Esq.

Denis DeVlaming, Esq.
Hon. Crockett Farnell
Karen Gregory (victim)
Marie King, Esq.
Peter Kumble
Hon. Mark King Leban
William Loughery, Esq.
Richard Mensh, Esq.
Paul Morris, Esq.
Robert Paver, Esq.
Richard Preira, Esq.
Scot Samis, Esq.
Hon. Susan Schaeffer

_____
PAUL MORRIS

STATEMENT REGARDING ORAL ARGUMENT

The appellant respectfully requests oral argument on the ground that it will aid in the decisional process.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I: WHETHER THE PETITIONER HAS ESTABLISHED A VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER *BRADY v. MARYLAND*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1967)?

II: WHETHER THE DISTRICT COURT FAILED TO MAKE A COLLECTIVE ANALYSIS OF THE ALLEGED *BRADY* VIOLATIONS?

III: WHETHER THE PETITIONER HAS ESTABLISHED A VIOLATION UNDER *GIGLIO v. UNITED STATES*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)?

STATEMENT OF THE CASE

Course of Proceedings and Dispositions in the Court Below

The appellant/petitioner, George A. Lewis, was charged in state court in Florida with first-degree murder and sexual battery and convicted following a jury trial. The trial judge ordered a new trial on the murder charge in the interests of justice and entered a judgment of acquittal on the sexual battery charge. The State appealed and the Second District Court of Appeal of Florida [Second District] reversed and remanded. *State v. Lewis*, 543 So. 2d 760 (Fla.2d DCA 1989) [*Lewis I*]. On remand, the convictions were reinstated and Lewis appealed. The Second District affirmed. *Lewis v. State*, 566 So. 2d 270 (Fla.2d DCA 1990) [*Lewis II*].

Thereafter, the petitioner's trial counsel learned that the State had withheld exculpatory evidence. The petitioner filed in the state trial court a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 ["state habeas"]. An evidentiary hearing was conducted by a successor judge who found that the State had indeed withheld favorable evidence but

nevertheless denied the motion. On appeal by the petitioner, the Second District affirmed. *Lewis v. State*, 714 So. 2d 1201 (Fla.2d DCA 1998) [*Lewis III*]. The petitioner sought and was denied review of his federal constitutional claims in the Supreme Court of Florida. *Lewis v. State*, 728 So. 2d 203 (Fla.1998) [*Lewis IV*].

On November 8, 1999, the petitioner timely filed in the district court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D[ocket entry]: 1). On March 31, 2003,- the district court entered an order summarily denying relief. (D: 37). The petitioner timely filed a notice of appeal. (D: 38). The petitioner applied for a certificate of appealability (D: 40) which the district court denied. (D: 39). This Court granted the petitioner's motion for certificate of appealability on the three issues addressed in this brief. (D: 43).

The petitioner is incarcerated.

Statement of the Facts

The victim, Karen Gregory, was found raped and murdered in the house of her boyfriend, David Mackey, in Gulfport, Florida. The crimes took place at approximately 1:15 a.m on Wednesday, May 23, 1984, when several neighbors heard a scream from the direction of the Mackey house. Not one of the neighbors called the police. At approximately 7:30 p.m. that evening, a man, later identified as Peter Kumble, drove up to the Mackey house, parked in the driveway and walked up to the front porch. The victim's and Mackey's cars were parked in front of the house. The victim's undiscovered body was still in the house. There was blood on the screen to the front door where there was a hole the size of a person's head, jalousie panes from the door were broken, glass from the front door was strewn along the sidewalk all the way to the curb, and drops of blood were on the front porch. Two of Mackey's neighbors, Martha Borkowski and the petitioner, saw Kumble when he arrived. Borkowski and the petitioner later reported to police that Kumble knocked on the inside door, received no answer, left the porch, looked up and down the street, then sat in his van. Despite the obvious signs that something was wrong, Kumble simply left a note on the windshield of one of the cars in the driveway and drove away. (R. 635-36, 639, 680). [FN1]

The note, later found by police, said: "Karen and David: Hello - stopped by about 7:15 or so but saw no signs of life. Many things to do tonight so I probably won't be back but I have something you wanted. Will be home not too late. Peter." (T. 1495, 1834).

At the time, Mackey was in Providence, Rhode Island. Concerned about not being able to contact the victim, Mackey telephoned a neighbor, Amy Bressler, at approximately 8:30 a.m. the next morning. Bressler walked over to the house and immediately noticed the broken jalousie window panes and the glass scattered along the walkway. Bressler also observed two newspapers on the front lawn. She walked around the side of the house, observed an open bedroom window, moved the curtains, saw the victim's body surrounded by blood, and called the police. (T. 3014-29; R. 616).

The case was assigned to four Gulfport detectives: Brinkworth; Tosi; Hansen; and Reed. From the outset, the investigation was mishandled. Some of the early mistakes included the following: Officer Falkenstein, the first officer to arrive at the Mackey house, entered through the same bedroom window used by the perpetrator (and was later chastised because such an entry often destroys critical evidence) (R. 3149-50); the Medical Examiner testified that the crime scene at the Mackey house was disturbed from the very beginning of the investigation, not only by Falkenstein's entry, but also by officers who walked through the house immediately after the discovery of the body (R. 3361); on the very same day the victim's body was discovered, the police unsealed the house and released the house to Anita Kilpatrick (the victim's former roommate) and her friend who commenced cleaning the scene (thereby destroying evidence) even before the police investigation was complete; Tosi complained about the releasing of the house and testified that the crime scene was mishandled (R. 683-84; T.3024-25); the officers responsible for processing the scene for fingerprints failed to check doorjambs, windows, casements, the broken jalousie windows of the door, and any walls from the floors upward (T.3242-60); Tosi testified that when the officers at the scene discovered a good set of fingerprints at the window screen, they mistakenly assumed that

they had solved the crime and "slacked off from that point on" (R. 684-85); much evidence was not collected or examined until months after the murder (T. 948-50); footprint and hand print measurements taken at the scene by the police were so inaccurate that the trial judge would rule them inadmissible at the petitioner's trial (T. 3949- 50); and scrapings from underneath the victim's fingernails were never tested (T. 4144).

The crime scene was horrific. Officer Falkenstein was so overcome by its gruesomeness that she was visibly shaking. (T. 3019-20). She testified that the experience contributed to her decision to leave the police force. (T. 3159-60). Tosi and other officers surmised that there was a struggle at the front door when the victim attempted to escape the attack. Her head struck the door which made the hole in the screen and broke the jalousie windows. (R. 638).

Kilpatrick planned to attend the victim's funeral in New York. Kumble mentioned to her that he was leaving town for several weeks and would be driving to Boston. She asked for a ride and Kumble agreed. Kilpatrick mentioned to Kumble that identification of the victim's body was necessary prior to the funeral and asked if they could stop at the Medical Examiner's Office. Kumble agreed and Tosi met them there. Kumble would later claim that the identification was disturbing to him. However, Tosi observed that Kumble was unusually calm. Later, as they sat at a conference table, Tosi looked at Kumble's right hand and observed a fresh large scratch. At that moment, Kumble moved his hand off the table (R. 690-91).

During the investigation, Tosi and Brinkworth asked Kumble on separate occasions about the scratches on his hands. Kumble told Tosi that the wounds were from playing with his dog. However, Kumble told Brinkworth that the wounds were from working on his car. (T. 3788-90). When Kumble was later asked about the inconsistency, he claimed that Tosi asked about the scratches on his hands which were from the dog whereas Brinkworth asked about the bruises on his knuckles which were from the car. (T. 3789-90).

The police terminated their investigation of Kumble and other suspects after they determined that the petitioner was the perpetrator. The determination was made based upon the discovery of his footprint, his inconsistent statements to the police, and the petitioner's concealment that he had been in the house. The case proceeded to trial by jury before the Honorable Crockett Farnell.

Prior to trial, the petitioner served upon the State a Demand for Discovery (R. 12-13) and a Motion for Disclosure of Brady Material which sought "... evidence of any inconsistent statements ... which tend to establish the unreliability of the State's witnesses' testimony" and all "material information which tends to negate the guilt of the defendant ... ". (R. 226-27). The motion was granted. (R. 88-9, 91, 234). The petitioner also moved for disclosure of the notes of interviews of Kumble conducted by Detectives Brinkworth or Tosi. That motion was also granted. (R. 93, 95, 231, 233, 1149-51). Due to page limits, all of the trial evidence is not detailed herein. A summary of the State's evidence can be found in *Lewis I*, 543 So. 2d at 762-64. The trial evidence deemed pertinent to this brief follows.

State witness Kumble testified that he knew the victim only "casually." (T. 3773). He arrived at the scene around 7:30 p.m. for a previously scheduled dinner with the victim and her boyfriend and walked up to the front jalousie door. He did not observe anything unusual. (T. 3775). There was no answer at the door. He wrote the aforementioned note and left it on one of the cars. (T. 3776). The next day, Kumble called the victim's house and the telephone was answered by Detective Brinkworth. Kumble testified: "I gave him my name, and he told me that there had been a potential burglary and homicide, and I was startled." (T. 3785). On cross-examination by petitioner's counsel, Kumble testified that on Tuesday nights, he taught a yoga class. Kumble was asked if he taught the class on the Tuesday night of the murder. He did not recall. (T. 3786). On the night of the murder, he returned home early in the evening. His roommate, Kenneth Kuhar, was there, and the two of them did not leave. (T. 3787). Kumble denied he was ever attracted to the victim. He denied that he desired a romantic relationship with her. (T. 3790).[FN2] When the

petitioner's counsel sought to cross-examine Kumble about whether he was the murderer and Kuhar was with him, the prosecutor successfully objected on the ground that there was no basis for such inquiry and received a jury instruction as follows:

> PETITIONER'S COUNSEL: Isn't it a fact, sir, that on Tuesday evening, you and Mr. Kuhar were out for the evening and you went by the Mackey residence?
>
> KUMBLE: No, that's not a fact.
>
> PETITIONER'S COUNSEL: You stopped there to see Ms. Gregory. You made advances. She became angry with you, and you killed her.
>
> KUMBLE: No, sir.
>
> PROSECUTOR: Excuse me a second. I want -- that's improper for this lawyer to ask a question that he has absolutely no good faith basis to put that on before this jury. And that's why I want the Court to instruct that jury to disregard that question.
>
> THE COURT: Sustained. Ladies and gentlemen, you should disregard the last statement by counsel.

(T. 3795). Upon redirect examination of Detective Tosi, the prosecutor adduced the following:

> PROSECUTOR: Did Mr. Kumble ever give you or any other law enforcement officers that you used specifically in this investigation an inconsistent statement?
>
> DETECTIVE TOSI: None. (T. 4167).

Detective Brinkworth testified about the telephone call Kumble placed to the Mackey residence. Brinkworth said that he told Kumble on the telephone "that Karen [the victim] had met with an untimely death and that I couldn't discuss it any further at that time." (T. 3763). There was no mention of the rape.

Although Tosi testified that Mackey expressed concern about the progress of the police investigation (T. 4000), the prosecution painted a picture to the jury through its inquiry of Tosi

that the police were not pressured to make an arrest in the case. (T. 4003).

The State attempted to connect the petitioner to a black lingerie "teddy" found on the victim bunched around her waist and over her shirt. Several weeks after the murder, Mackey told police that a white teddy belonging to the victim was missing from his house. A neighbor, Tonya Dishong, who had a relationship with the petitioner, testified that he gave her a white teddy for her birthday during the summer of 1984. Mackey identified Dishong's teddy as being exactly like the victim's. *Id.* However, on cross-examination by petitioner's counsel, Dishong testified that when the petitioner gave her the white teddy, he produced it from a shopping bag, the teddy had not been worn and appeared new, and Dishong thought the teddy might even have had its price tag attached. (T. 3970).

The petitioner testified in his own behalf. He was employed as a firefighter with the St. Petersburg Fire Department. At the time of the murder, he was living with his wife to be, Glenda Lewis, across the street from Mackey's house. Mrs. Lewis was asleep and the petitioner was in his garage welding a bumper for a lieutenant in the fire department. The petitioner regularly did repairs in his garage in the early morning hours. With the fire department, he worked twenty-four hour shifts, one day on and two days off, and on this occasion he was off work the next day. He had just finished the welding and removed his boots when he heard the scream. He had the radio on. He lowered the volume, opened the garage door, turned off the garage light, looked around, walked east, saw nothing, walked the other way, then observed someone standing near the victim's house. The petitioner asked if anything was wrong. The stranger told the petitioner to mind his own business and "get the hell out of here." (T. 4282-90). The stranger walked away. (T. 4291).

The petitioner walked toward the Mackey house and observed broken glass on the sidewalk. The petitioner knocked on the front door and there was no answer. Believing something was wrong, he went around the house where there was one back window with the shades open. The screen to the window was

hanging. There was faint light in the house allowing him to see a person on the floor. He crawled through the window. He observed the murdered victim. There was blood on her neck and the rest of her body. The gory scene was so overpowering to him (as it was to Officer Falkenstein) that he went to the bathroom, where the light was coming from, vomited in the toilet, and flushed it. The petitioner had no experience with crime or crime scenes. He did not call the police because he was terrified that his presence at the scene would make him a suspect and the authorities would not believe that he entered the window out of curiosity. He returned home, entered his garage, and shut the door, fearing that the stranger he saw might be coming to his house. He removed his work clothes and as always put them near the laundry. Mrs. Lewis was awake and asked if he heard the scream. He said yes but did not tell her what he saw and decided not to tell anyone. (T. 4292-4321).

The petitioner took security measures. He installed floodlights on the garage, showed Mrs. Lewis how to use a rifle, had a telephone installed in the bedroom, adopted a large dog, and alternated taking cars to work so people would not know when his wife was home without him. (T. 4265; 4300-01).

The petitioner described the stranger to Tosi and a composite drawing was created. The petitioner did not know Kuhar, who was Kumble's roommate. The petitioner was later shown a photograph of Kuhar and said: "I can't swear to it, but that's him." The petitioner was not aware at the time that Kuhar and Kumble were each other's sole alibi for the night of the murder. (T. 4124, 4303-04, 4335, 4339-41.) [FN3] The petitioner concealed from the police his entry into the house out of his continuing fear that the authorities would wrongfully suspect him of the murder. (T. 4303, 4312-17).

The petitioner testified that the teddy he gave to Dishong did not come from the Mackey house. (T. 4302). Rather, he purchased it on a day when he did much shopping. (T. 4302). Finally, the petitioner denied murdering or raping the victim. (T. 4306).

The petitioner's wife testified that she was a new accounts representative at First Florida Bank, she and the petitioner had been married for two and one-half years, they had a two-year old daughter, and they were expecting their second child. (T. 4253-73). On the date in question, she was awakened by the scream, looked outside, but saw nothing. She saw that the garage light was off and the garage door open. She sat in the kitchen next to the window. Right outside the window was the hose which she did not hear, but would have. (The prosecution argued the petitioner had turned it on to hose off blood.) She waited for the petitioner. About ten minutes passed and he came in looking pale. However, there was nothing else unusual about his appearance. He was not wet. [FN4] The petitioner told her that he heard the scream as well. Mrs. Lewis stated that the petitioner would always go outside when he thought something was wrong and she often voiced her disapproval. He said he would lock up and put away his tools. They went to bed. (T. 4253-80). Mrs. Lewis confirmed that afterward, the petitioner put up floodlights, adopted a large dog, installed a telephone in the bedroom, and traded cars with her so that anyone watching the house would think someone was home and not know their routines. (T. 4263-65).

Defense witness Marie Barrett was the first paramedic to arrive on the scene. Upon reviewing the State's photographs of the victim's body (which purported to depict the victim's body when first discovered), Barrett testified that the victim's body had been moved from its original position. (T. 4216-17). Janet Beasley, a private investigator, testified for the defense that she photographed Kuhar in November 1986. Kuhar had a beard and mustache (T. 4235-38; Defense Exhibit 27) (as did the petitioner's composite drawing of the stranger). Senior Paramedic Leroy Partington testified for the defense. The petitioner was an emergency medical technician [EMT] when Partington met him. Partington explained that an EMT is a person in training to become a paramedic. Partington stated that even experienced paramedics get sickened at bloody scenes. "You can't train that into anybody I don't care how long you've been on the street ... sometime or other you're going to run into something that really affects you." (T. 4242-43).

In the State's rebuttal case, Kuhar testified that although he had a beard when photographed by the investigator, he had no beard when the murder was committed. (T. 4350-55).

The jurors deliberated approximately 13 hours over two days. During their deliberations, the jurors requested to review: the testimony of the medical examiner; the testimony of the petitioner; the petitioner's taped statement to the police; the medical examiner's tape; and the tape of the forensic testing at the scene. (T. 4651-68; 4676-93). The jurors found the petitioner guilty as charged but unanimously recommended life imprisonment instead of the death penalty. (T. 4971).

The petitioner moved for a new trial alleging numerous errors and prosecutorial misconduct. (D: 10 -- Supplemental Appendix, Motion for New Trial). Prior to sentencing, Judge Farnell ordered a new trial on the murder charge, finding that "this was a close case" and that the cumulative effect of several errors required a new trial. (D: 10 -- Supplemental Appendix, Order Granting Motion for New Trial). The judge entered a judgment of acquittal on the sexual battery charge. *Id.* The orders were reversed on appeal and the cause was remanded for sentencing on both charges. *Lewis I.* The petitioner was sentenced to life imprisonment for first degree murder and 12 years for sexual battery. (R. 7-10).

The petitioner's trial counsel made a public records request and received voluminous records containing evidence favorable to the defense which the prosecution concealed. The petitioner filed his State habeas action (R. 19-26) alleging, in pertinent part, *Brady* violations as follows:

a.

The State suppressed a sworn statement taken from Maureen Byrnes by two prosecutors on July 19, 1984. (R. 135-71, Exhibit 11). Byrnes stated that on Thursday night, May 25, 1984, Kumble telephoned her and said he had just spoken with an officer (later identified as Brinkworth). Byrnes testified as follows in her statement:

> He told me that -- I believe he asked me -- he said, do you remember Karen [Gregory], and I said yeah, sort of, know, like oh, wait a second, okay. And he said -- he was very serious. His voice was real serious, and he said, well, she was RAPED and killed, and that caught my attention. I thought he was just originally going to just -- to tell me about somebody. And I either asked him or he told me, how did you find out about that, and he said he had just gotten off the phone with the police -- Gulfport Police.

(R. 144-45, Exhibit 11 at 11) (emphasis supplied). Because Brinkworth did not disclose that the victim had also been raped, the petitioner alleged that Kumble's statement to Byrnes was favorable to the defense because only the perpetrator would have known at that time of the rape. (R. 65-6).

The significance of Kumble's knowledge that the victim had been raped was not lost upon the two prosecutors when they took Byrnes's statement. They made her repeat five more times that Kumble had indeed told her that the victim was *raped* as well as murdered. (R. 145, Exhibit 11 at 11; R. 148, Exhibit 11 at 14; R. 151, Exhibit 11 at 17; R. 152, Exhibit 11 at 18; R. 152, Exhibit 11 at 18).

Byrnes also testified in her statement that Kumble told her that he went to the victim's house the previous night to return a tape but he did not mention the dinner plans (which he would later claim). Kumble also told her that he noticed broken glass (which he would later deny). (R. 142, 146). The prosecutors not only concealed that Byrnes gave them a sworn statement, they entirely omitted Byrnes's name from the witness lists provided to the defense. (R. 2935, 2929).

b.

The State concealed the voluminous Supplemental Report of Detective Brinkworth [Brinkworth's Report] (R. 100-121, Exhibit 6). Brinkworth's Report contained interviews with Byrnes, Kilpatrick, Mackey and Kumble.

Brinkworth's Report revealed that Byrnes and Kilpatrick both stated in their interviews that Kumble showed an "enormous amount of desire and interest in Ms. Gregory...". (R. 105; 119). (Kumble would later deny any interest in or attraction to the victim.) However, in her pretrial deposition, Kilpatrick testified that Kumble had no interest in the victim. (Supplemental Appendix, Kilpatrick Deposition at 22).

Kilpatrick also advised the officers that "Ms. Gregory did not in any way have any intentions of any type of a dinner meeting nor did she request any type of an item to be returned to her which was stated by Mr. Kumble in his interview." (R. 119).

Brinkworth's Report indicated that Mackey was interviewed in 1984 on May 29, June 6, 7, 8, 13. Mackey stated in the June 6 interview that his business trip to Providence, Rhode Island "... had been discussed several weeks in advance and that Ms. Gregory had known of the trip and had related this to Ms. Covington, her best friend, and to her ex-roommate Anita Kilpatrick ...". (R. 107).

Brinkworth's Report revealed that Kumble was exhaustively interviewed on June 12, 1984 by Brinkworth and Reed (R. 112-18) and that Kumble was targeted by the officers as a "prime suspect." (R. 112). The officers learned that Kumble missed teaching his yoga class on the night of the murder when he otherwise had an "impeccable" attendance record. Kumble was confronted with his absence and claimed that he did not teach that night "because he was looking forward to his trip, in anticipation [of] his trip, and that he had many chores to do...". (R. 115).

Kumble was asked why he went to the victim's house on May 24. Kumble answered that he was returning a tape he borrowed from the victim. Brinkworth immediately confronted Kumble with his prior statement (made in Kumble's telephone call to the Mackey house which was answered by Brinkworth) that he went to the victim's house for a dinner with Mackey and the victim. Brinkworth's Report reveals: "Kumble then suddenly remembered that he had been invited for dinner supposedly by Ms. Gregory and that he had gone there in anticipation of dinner ...". (R. 114). Kumble was asked why he omitted the dinner date from

his answer. Brinkworth's Report notes Kumble's response as follows: "Mr. Kumble said he forgot." *Id.*

Kumble was asked whether he expected Mackey to be at the house for the dinner. Brinkworth's Report states: "... Kumble state[d] that he thought that Mr. Mackey would be there and had no reason to doubt that Mr. Mackey would not have been there and was looking forward to meeting him and having dinner with him." (R. 114). However, later in the same interview, while Kumble was speaking about an offer he made to drive the victim up north (which the victim rejected), Kumble mentioned Mackey being in Providence, Rhode Island as follows: "Mr. Kumble then stated that he took for granted that possibly Ms. Gregory was going to meet Mr. Mackey in and around the Providence area and ride back with him." (R. 116).

Detective Reed asked Kumble if he noticed any broken glass on the front walkway of Mackey's residence. (R. 116). Kumble answered "that he observed the broken glass as he entered into the front porch area, and as he walked around the residence...". *Id.* Brinkworth's Report further provided: "[Kumble] thought to himself that the house seemed out of character having broken glass when it was so well kept other than that." *Id.*

Kumble also said in the interview that he saw the victim at Kilpatrick's birthday party on March 9, 1984. Kumble revealed that the following happened at the party:

> Mr. Kumble then added that at that birthday party, Ms. Gregory seemed very depressed because of her fight with her boyfriend and that they did take a walk up to the beach and back however it wasn't of any long duration and she just wanted somebody to talk to and he lent her a shoulder and that he just felt like she confided in him about the problems she was having with Mr. Mackey, being that Mr. Mackey worked too much and was too engrossed in his job.

(R. 113). Brinkworth concluded his Report as follows: "[F]ollow up and investigative methods should be used in the pursuit and

further investigation of a Peter A. Kumble, prime suspect at this point in the investigation..." . (R. 121).

c.

Also discovered pursuant to the Public Records request but never disclosed by the State was a letter dated September 7, 1984, written by Mackey and sent to Tosi. (R. 123-26, Exhibit 7). The letter confirmed that according to Byrnes, Kumble told her that the victim was "raped and murdered" immediately after he had spoken to Brinkworth on the telephone and characterized Kumble as the "prime suspect." In his letter, Mackey also voiced severe criticism of the police investigation and threatened to take the issue to the media, use his influence, and exert political pressure so that the case would be afforded top priority. (R. 125-26). Mackey's letter also revealed the following: "Over the last three months, several acquaintances [of Kumble] have provided descriptions of the suspicious behavior that he has exhibited when discussing the murder with them. Specifically, it was reported that [Kumble] has openly suggested that Karen Gregory was engaging in outside affairs and had somehow set herself up to be assaulted and killed. *** I consider that this suspect, if he is indeed guilty, might well be generating such repulsive rumors as a tactic to direct attention away from his own culpability." (R. 125).

d.

The prosecution suppressed a memorandum dated September 18, 1985, which indicated that four bags of evidence seized from the crime scene were opened without authorization, deemed contaminated, and therefore not subjected to forensic analysis. (R. 212, Exhibit 25). It was later determined that the memorandum was authored by prosecutor Beverly Andrews.

e.

Also suppressed by the State was evidence which incriminated suspect Steven Louis Fischler. A suppressed

investigative report (R. 177-78, Exhibit 16) revealed that Fischler and the victim worked together at a company known as Datacom. Co-worker Maggie Moran was interviewed and stated that Fischler gave her the "creeps." She said that Fischler gave her a sexually perverted novel he had been working on which dealt with nurses. Co-worker Lee Jargowski stated that Fischler would make sexual comments toward the females in the office and would become angry when his advances were rejected. Jargowski added that between January and April of 1984, she and Fischler took a business trip together. Fischler told her that he did not like some of the people at Datacom because they had criticized him and he was going to "get back" at them. Co-worker Pat McGivern said that Fischler would stare at her, he was weird, and she felt uncomfortable around him. Fischler made comments of a sexual nature toward her. (R. 177-78).

The prosecution concealed an incriminating statement made by Fischler. The statement was not disclosed to the defense until after the petitioner's trial by former Gulfport Detective Scott Barnes. Barnes executed a sworn statement in 1990. (R. 162-71). Barnes stated that he and Brinkworth were in a room next to where Fischler was being polygraphed about the murder. Barnes overheard Fischler state: "Okay, I did it," meaning that he had murdered the victim. Barnes was under the impression that Fischler had failed several polygraph examinations. Barnes later spoke with Tosi who confirmed that Fischler had stated that he did commit the murder. In October of 1990, Barnes saw one of the petitioner's trial counsel, Robert Paver, and asked him why Fischler's statement was never pursued by the defense. (R. 162-71).

The State Habeas Hearing

An evidentiary hearing on the petitioner's State habeas motion was held before a successor new judge. (R. 2499-2815; 2816-3123; 3124-3404; 3405-3493). The evidence adduced at the hearing is detailed in the petitioner's memorandum filed in support his petition for writ of habeas corpus (D: 9) and is discussed in

pertinent part in this brief. The State habeas judge entered a written order denying relief (R. 2419-43) which the Second District affirmed on appeal. *Lewis III*.

The Federal Habeas Proceeding

The district judge denied the petitioner's request for federal habeas corpus relief in a written order that essentially adopts the order of the State habeas judge. (D: 36).

Standards of Review

In habeas cases, this Court reviews *de novo* the district court's determination as to whether a state court decision was reasonable and reviews for clear error the district court's findings of fact underlying the claim. *Washington v. Crosby*, 324 F.3d 1263, 1265 (11th Cir.2003). This Court reviews *de novo* a district court's determination as to whether evidence suppressed by a prosecutor undermined confidence in the trial and was therefore material. *United States v. Scheer*, 168 F.3d 445, 452 (11th Cir.1999).

SUMMARY OF THE ARGUMENTS

I: The petitioner was convicted of a murder and rape he steadfastly maintains he did not commit. The State's case was entirely circumstantial and so weak that the presiding trial judge jettisoned the jury's verdicts, finding that the evidence was "close" and the trial unfair. There was not a single eyewitness to the murder and rape. The petitioner had no motive to kill the victim. In fact, the petitioner did not even know the victim. But Peter Kumble did know the victim and had opportunity and motive for the crimes. The prosecution portrayed Kumble as innocent and having made no inconsistent statements to the police during the investigation. The petitioner testified in his own behalf and his testimony was corroborated. The jury found the petitioner guilty only after difficult and lengthy deliberations. After the trial, the

petitioner discovered a wealth of information suppressed by the prosecution, including Kumble's inconsistent statements to the police and his knowledge that the victim had been raped before the police released that information. There were many other nondisclosures which would have rendered the defense markedly stronger and the prosecution markedly weaker.

In reviewing the prosecution's concealments, the State habeas judge applied the wrong standards for determining materiality, failed to evaluate the suppressed evidence collectively, and erroneously engaged in a sufficiency-of-the-evidence analysis. By approving the State habeas judge's analysis, the Second District made the same mistakes. The state courts have rendered rulings that are contrary to and involve an unreasonable application of clearly established decisions of the Supreme Court of the United States. The state court rulings are also based upon unreasonable determinations of the facts in light of the evidence presented in the State court proceedings, thereby entitling the petitioner to relief under 28 U.S.C. § 2254(d)(1) and/or (d)(2).

II: The district court and State habeas judge evaluated the *Brady* violations item-by-item and concluded that each was not material. In so doing, the courts violated the Supreme Court's decision in *Kyles* which requires a collective analysis.

III: The prosecution knowingly adduced and used false testimony.

ARGUMENT

I.

THE PETITIONER HAS ESTABLISHED A VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER *BRADY v. MARYLAND*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1967).

In *Brady*, the Supreme Court of the United States held as follows:

> The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

> punishment, irrespective of the good faith or bad faith of the prosecution.

373 U.S. at 87, 83 S.Ct. at 1196-97. The rationale of the rule of *Brady* is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty ... casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice...". 373 U.S. at 87-88, 83 S.Ct. at 1197.

In this case, the state prosecutors were architects of a trial that failed to comport with standards of justice. After all, the State habeas judge found that the State failed to disclose substantial evidence that was favorable to the petitioner's defense that someone else committed the crimes charged. However, the State habeas judge and reviewing court excused the prosecutors' misconduct by concluding that none of the concealed evidence was "material." The district judge adopted the State habeas court's reasoning in its entirety. These determinations as to materiality are at complete odds with *Brady*, its progeny, fundamental notions of due process and fair play, as well as the interests of justice.

Since *Brady*, the Supreme Court has elaborated upon the issue of "materiality." In *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court held that favorable evidence is material, and constitutional error results from its concealment by the prosecution, " ' if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 1565, 131 L.Ed.2d 490 (1995) (quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. at 3383).

Critical to understanding how the courts went wrong in this case is the explanation by the Supreme Court in *Kyles* that the focus is upon the fairness of the trial the accused received rather than upon whether a different result would have occurred had the prosecution revealed the suppressed evidence:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal.... *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question [under *Brady*] is not whether the defendant would more likely than not have received a different verdict with the [suppressed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 434, 115 S.Ct. at 1566 (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381) (citations omitted). See also *Strickler v. Greene*, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). The Supreme Court also stated that no *Bagley* error can ever be harmless because a reasonable probability of a different result "necessarily entails the conclusion that the suppression must have had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*

Also critical to this appeal is the axiom that the determination of the materiality of undisclosed evidence is not to be made by an item-by-item analysis. Rather, the suppressed evidence must be evaluated "collectively." *Kyles*, 514 U.S. at 436, 115 S.Ct. at 1567. Undisclosed evidence might not meet the test for materiality when viewed item-by-item but can be material when considered collectively. *Kyles*, 514 U.S. at 441-54, 115 S.Ct. at 1555.

In sum, four elements govern the materiality determination as this Court stated in *Hays v. Alabama*, 85 F.3d 1492, 1498 (11th Cir.1996):

> [First], a showing of materiality does not require demonstration by a preponderance that disclosure of the

> suppressed evidence would have resulted ultimately in the defendant's acquittal (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566). "Thus, undisclosed evidence can require a new trial even if it is more likely than not that a jury seeing the new evidence would still convict." *Id.* [Second], "a defendant need not show there was insufficient evidence to convict in view of the suppressed evidence." *Id.* [Third], "there is no harmless error review of *Bagley* errors." *Id.* [Fourth], "materiality is to be determined collectively, not item-by-item." *Id.*

Directly contrary to the above-quoted standards governing materiality, the State habeas judge analyzed the *Brady* violations item-by-item rather than collectively, and applied the wrong standard by denying relief to the petitioner on the ground that with the suppressed evidence, a jury would not have acquitted. In fact, the State habeas judge's order reflects both errors in one sentence as follows: "Now that the court has analyzed the alleged *Brady* material **separately**, this court must undertake analysis of the fourth test which is if the evidence had been disclosed, is there a reasonably probability that the outcome of the proceedings would have been different. **Put another way, had the *Brady* evidence been disclosed, is there a reasonably probability that George Lewis would have been acquitted of the murder and rape of Karen Gregory**." (R. 2475) (emphasis supplied). Employing the same incorrect standard, the Second District found "it highly unlikely that a new trial would result in Lewis's acquittal." *Lewis III*, 714 So. 2d at 1202.

In order to state a claim for federal habeas relief, the petitioner must meet the requirements of the Antiterrorism and Effective Death Penalty Act of 1966 [AEDPA]. In 28 U.S.C. § 2254, the AEDPA provides in pertinent part as follows:

> (d) A application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim -

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

A state court decision constitutes an "unreasonable application" of federal law if it identifies the correct legal rule from Supreme Court case law, but applies that rule in an unreasonable manner to the facts of petitioner's case. *Breedlove v. Moore*, 279 F.3d 952, 961 (11th Cir.2002); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir.2000). "This could also occur if the state court unreasonably extends, or declines to extend, a governing legal principle (as established by Supreme Court case law) to a new context." *Breedlove*, 279 F.3d at 961. "An unreasonable application of federal law does not refer to an incorrect or erroneous application, but rather to one that is objectively unreasonable." *Id.*

State court decisions are accorded deference in federal habeas proceedings. But that deference is not absolute. Factual determinations by the state courts are presumed correct but only in the absence of clear and convincing evidence to the contrary. § 2254(e)(1). Furthermore, a state court's decision adjudicated on the merits and based upon a factual determination is subject to being overturned on factual grounds if it is objectively unreasonable in light of the evidence presented in the state-court proceeding. § 2254(d)(2). Additionally, the Supreme Court has further explained:

> Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review.

> Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1041, 154 L.Ed.2d 931 (2003).

As noted, the petitioner is not required to show that disclosure of the exculpatory evidence would have resulted in his acquittal. *Kyles, supra.* He need only show that he received an unfair trial in its absence, a trial which did not result in a verdict worthy of confidence. *Id.* In fact, the petitioner is entitled to a new trial "even if it is more likely than not that a jury seeing the new evidence would still convict." *United States v. Scheer*, 168 F.3d 445, 452 (11th Cir.1999) (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. at 1566). It is enough that disclosure of the suppressed evidence "'would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense.'" *Scheer*, 168 F.3d at 456 (quoting *Kyles*, 514 U.S. at 436, 115 S.Ct. at 1569).

The state courts clearly, indeed expressly, applied rules of law contrary to that established by the Supreme Court. First, the State habeas judge engaged in an item-by-item analysis of the *Brady* violations contrary to the collective analysis required by *Kyles*. Although the State habeas judge's decision briefly mentions the requirement of collective analysis on two occasions (R. 2420, 2443), no collective analysis was conducted. As a result of this failure, the petitioner should have received from the district court independent consideration of the merits of his claims. See *Neelley v. Nagle*, 138 F.3d 917, 926-27 (11th Cir.1998). Instead, the district court merely adopted the State habeas judge's flawed analysis.

Second, the state courts improperly "considered the sufficiency of the evidence in light of its potential to exculpate [the petitioner] instead of through the lens of its confidence in the verdict." *DiLosa v. Cain*, 279 F.3d 259, 264 (5th Cir.2002)

(holding state prisoner entitled to federal habeas corpus relief under the AEDPA where state court applied incorrect principle in its *Brady* analysis by determining materiality of suppressed evidence based upon whether its consideration by a jury would have created a reasonable possibility of acquittal). See also *Scott v. Mullin*, 303 F.3d 1222 (10th Cir.2002).

Once the proper collective analysis is applied along with the correct standard, it becomes evident that the conclusion of the state courts that the petitioner was not prejudiced by the concealment of evidence is an "unreasonable application" of Supreme Court precedent to the facts. See, *e.g., Boyette v. Lefevre*, 246 F.3d 76, 92 (2d Cir.2001) (relief required under AEDPA where state court's determination that petitioner was not prejudiced by failure to turn over *Brady* material was an unreasonable application of clearly established law). The requisite collective evaluation of the suppressed evidence demonstrates that the petitioner received an unfair trial in violation of *Kyles, Brady,* and their progeny. The State concealed from the petitioner, *inter alia*, the following: Brinkworth's Report; the sworn statement of Kumble's former girlfriend, Maureen Byrnes; Mackey's letter to Detective Tosi; the memorandum that four bags of debris collected from the scene were not analyzed due to contamination; and Fischler's statement. Contained within these items is a plethora of evidence impeaching key witnesses and pointing the finger of guilt away from the petitioner.

A collective analysis of the suppressed evidence concerning Kumble alone mandates a new trial. That evidence included the following: Kumble's statement to Byrnes that he learned from Detective Brinkworth that the victim had also been raped when Brinkworth did not disclose that fact (which obviously and compellingly supported the defense theory that Kumble was the murderer and rapist); Kumble's concealment from the police of his statement to Byrnes that the victim had also been raped; Kumble's concealment from Brinkworth and Byrnes of his supposed dinner date with the victim, along with Kilpatrick's statement that the victim "did not in any way have any intentions of any type of a dinner meeting"; Kumble's statement to the police

that the Mackey house seemed "out of character" and he saw broken glass at the scene, which directly impeached his trial testimony that there was nothing unusual at the scene; Kumble's statement to the police that he did not teach his yoga class the night of the murder, which contradicted his trial testimony suggesting that he might have taught the class that night; Kumble's statement to the police that he knew Mackey was in Providence, Rhode Island, which impeached his trial testimony that he was invited for dinner by both Mackey and the victim and expected Mackey to be home for the dinner date; Kumble's statements indicating his romantic desire for and interest in the victim, which impeached his trial testimony that he had no interest in her and was not attracted to her; Kumble's inconsistencies about the wounds to his hands and his attempt to hide the wounds from the police; and Kumble's statements to various acquaintances that the victim had affairs and set herself up to be murdered.

Collectively evaluated, the above-listed suppressed evidence regarding Kumble is sufficient in and of itself to require a new trial without regard to all of the other suppressed evidence. The evidence is, at the very least, impeachment evidence of the highest materiality, striking directly at the credibility of a key prosecution witness.

The petitioner's case for a new trial is even stronger when the evidence against Kumble is considered, as it must be, along with the other concealed evidence, such as the contamination of four bags of debris seized from the scene. The decision not to analyze that evidence due to the contamination now provides an explanation as to why the authorities did not find fingerprints, footprints or any other physical evidence to connect Kumble to the scene.

The suppressed statement of Fischler, another prime suspect, that he committed the crimes, must also enter into the collective evaluation. The materiality of the confession of another should be self-evident.

Also concealed by the State was the threat from Mackey to the police that he would go to the press and exert his influence if an arrest was not made. That evidence impeached Tosi's testimony

that neither he nor any officer was under any pressure to make an arrest. Mackey's threat also supported the defense that a rush to judgment resulted in the petitioner's arrest and the premature cessation of the investigations into other suspects.

As noted, the State habeas judge denied relief after considering individually each *Brady* violation. Even under such an impermissible analysis, the denial of relief cannot be squared with *Brady* and its progeny, as the following review of the reasoning of the State habeas order plainly shows.

1.

The State habeas judge speculated that had the prosecution not suppressed Kumble's statement to Byrnes indicating his knowledge that the victim had been raped, then at the petitioner's trial, Kumble could have denied he made the statement, Byrnes would have testified that she did not recall if Kumble said "raped," Byrnes's sworn statement would be inadmissible as substantive evidence, and that would be the end of the matter. (R. 2435-36).

Whether Kumble would deny having made the prior statements is as speculative as whether he would fumble, hedge, hesitate, or even succumb and acknowledge that he made those statements. What would take place at a trial where the *Brady* evidence is not concealed cannot be determined until the petitioner is afforded a new fair trial with the use of the suppressed evidence. Cross-examination can expose a witness's lies not only by admission but also by subjecting his demeanor for scrutiny review by the jury when he is confronted with impeaching evidence.

Even if Kumble answered in the negative, the petitioner's counsel had the right to ask this question armed with the sworn statement of Byrnes. Regardless of what Kumble might say or how he would react, the petitioner could call Byrnes as a defense witness and ask her this one question: "Did you give a sworn statement that immediately after the discovery of the victim's body Kumble telephoned you and said that he just learned that the victim had been raped and murdered?" Byrnes would answer in the affirmative and the point would have been made to the jury. No matter what the State argued or presented in response, the jurors

could then disbelieve Kumble, believe Byrnes's sworn statement, and draw the reasonable inference that Kumble had information known only to the murderer.

In any event, one cannot determine how Kumble would answer or react to the concealed evidence. The point of *Brady* and its progeny is that the petitioner is entitled to the opportunity to impeach, the denial of which constitutes the denial of the constitutional right to a fair trial and due process of law.

Moreover, Byrnes's vacillation at the state habeas hearing in no way lessens the significance of her 1984 sworn statement taken at a time when, as she herself testified, her memory was much fresher. In *Norris v. Slayton*, 540 F.2d 1241 (4th Cir.1976), the investigating officer stated in a report that the rape victim was unsure whether the defendant was the assailant. The prosecution did not disclose the report. At trial, the victim testified she was certain the defendant was the assailant. It mattered not that the victim later changed her position. The report "was evidence which had a direct bearing upon the critical issue in the case and might 'reasonably have weakened or overcome testimony adverse to the defendant.'" *Id.* at 1244 (citation omitted). Similarly here, Byrnes's vacillation years later does not alter the materiality of her sworn statement. In fact, the discrepancy itself constitutes critical impeachment evidence for a jury which is as constitutionally significant under *Brady* as any exculpatory evidence.

The State habeas judge further reasoned that even if the defense were permitted to ask Byrnes whether it was possible Kumble had said "raped and murdered," Brinkworth would testify in rebuttal for the State that she did not and "the impact of this testimony would be reduced." (R. 2436). However, the impact or weight of testimony, of course, is a question for the jury. More importantly, the suppressed evidence raises a factual issue the petitioner was unconstitutionally prevented from presenting at all.

Taken to its logical end, thee State habeas judge's reasoning could be applied to all impeachment evidence and thereby render *Brady* meaningless. A prosecutor could always attempt to lessen the impact of the impeachment of its witnesses. Of course, *Brady*, *Giglio* and their progeny hold otherwise. The

denial of an accused's opportunity to impeach (without regard to what the witness's answer might be) is the constitutional violation. The State habeas judge's reasoning draws the distinction between impeachment and exculpatory evidence which *Brady* and its progeny obliterated in no uncertain terms. As this Court has stated: "In rejecting any distinction between impeachment evidence and exculpatory evidence in the *Brady* context, the Supreme Court has observed that '[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' " *United States v. Scheer*, 168 F.3d 445, 452 (11th Cir.1999) (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959)). The jury in the petitioner's case could have believed Kumble was not credible and was involved in the crimes simply upon his impeachment with the suppressed evidence regardless of the answers of Kumble or the other relevant witnesses.

The State habeas judge only envisioned scenarios which were favorable to the State were the *Brady* evidence disclosed prior to trial. It is just as reasonable to expect that the following would take place: Kumble's demeanor changes markedly upon being confronted with his statement, thereby indicating concealment and guilt; Byrnes's recollection is refreshed upon deposition or at trial and she confirms her sworn statement (as noted, she testified at the state habeas hearing that her sworn statement was closer in time to the events and her memory was better then); the trial judge admits into evidence Byrnes's sworn statement relating Kumble's statement about the rape over a hearsay objection on the ground that the statement is not being admitted for its truth (that there had been a rape and murder) but rather for Kumble's knowledge (that the victim had been raped); and so on. The point is that the State habeas judge, instead of applying the materiality test of *Kyles*, imagined how a prosecutor might respond to the petitioner's use of the concealed evidence and concluded that such a response would carry the day and the petitioner would again be found guilty. The State habeas judge did

not simply unreasonably apply *Brady* and its progeny. The State habeas judge uprooted those decisions.

The State habeas judge also reasoned that if Byrnes testified as a defense witness at the petitioner's original trial that she did not recall what Kumble told her, the petitioner could not impeach her with her sworn statement. (R. 2435-36). The judge's conclusion is entirely illogical. It is true that at the time of the petitioner's trial, the rule in Florida was that a party could not impeach his own witness. However, had the sworn statement of Byrnes been properly disclosed to the petitioner prior to trial and Byrnes was called as a defense witness, at that time her recollection would more likely have been consistent with her sworn statement in which event no impeachment would be necessary. Byrnes's recollection only vacillated years later. Furthermore, if the petitioner is granted a new trial now and Byrnes vacillates, she can be impeached with her sworn statement because Florida law presently allows a party to impeach his own witness. See § 90.608, Florida Statutes.

Moreover, Kumble's statement to Byrnes that the victim was raped and murdered is not inadmissible hearsay because it is offered not for its truth (that the victim was raped and murdered) but for Kumble's knowledge of the rape when that fact would not be known to him unless he had first-hand knowledge. Although a state court's interpretation of state evidentiary rules is generally not assailable in federal habeas proceedings, an exception arises where the state judge's ruling "amounts to an egregious, unsupportable application of state law designed to frustrate [the petitioner's] *Brady* claim. *Breedlove*, 279 F.3d at 964. Such is the case here.

Thus, even when considered individually, Byrnes's suppressed statement meets the test for materiality under *Brady*.

2.

At the petitioner's trial, Kumble testified that he had no romantic interest in Ms. Gregory, the victim. The suppressed evidence contained Byrnes's interview in which she stated that " ...

Mr. Kumble had related to her on many occasions that Ms. Gregory seemed like a very interesting person ... ". Also suppressed was Kilpatrick's interview wherein she "... stated that Mr. Kumble over the past year had expressed an enormous amount of desire and interest in Ms. Gregory ... [and that] ... the only other individual that ever showed an interest in Ms. Gregory, an avid interest in Ms. Gregory, was Peter A. Kumble." (R. 105; 119). The State habeas judge ruled that the petitioner already knew about this evidence from Brinkworth's deposition.

This ruling constitutes an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. See 28 U.S.C. § 2254(d)(2). Brinkworth's deposition provides nothing remotely similar to the concealed Byrnes and Kilpatrick interviews. To the contrary, Brinkworth misrepresented this issue in such a way as to dissuade the defense from pursuing the matter when he testified upon deposition that Byrnes told him that Kumble "had made reference to [the victim] as being a friend ... but she did not ever indicate to me that he had made any more reference than just a friend." (R. 388). In sum, the defense was not possessed of any evidence that Kumble had an "enormous amount of desire" directed toward the victim.

3.

The State habeas judge ruled that there was nothing regarding Kumble's yoga class or alibi contained in Brinkworth's Report that the defense did not already know. (R. 2422).

However, the judge failed to compare Kumble's interview contained within Brinkworth's Report to Kumble's trial testimony. In the interview, Kumble stated that he did not teach the class "because he was looking forward to his trip, in anticipation [of] his trip, and that he had many chores to do...". (R. 115). At the petitioner's trial, however, Kumble testified that he did not recall whether he taught the class the night of the murder. (T. 3786). The suppressed evidence impeached Kumble's trial testimony. Whether the defense knew that Kumble did not teach the class is not the issue. The issue is that the defense was denied specific impeachment evidence bearing directly upon Kumble's credibility.

4.

The prosecution suppressed the fact that Kumble concealed from Brinkworth his dinner date with the victim. The State habeas judge ruled that the defense already knew this fact from the note Kumble left on the car windshield. The ruling is unsupportable for the simple reason that the note in no way informed the defense that Kumble concealed the dinner date from the authorities.

Kumble similarly concealed the dinner date from Byrnes. The State habeas judge ruled that this concealment would be expected due to the relationship between Byrnes and Kumble. This ruling not only is rank speculation, it invades the province of the jury. Jurors could have reasonably concluded otherwise, namely, that Kumble slipped when he mentioned the rape and hoped that his carelessness would be forgotten.

5.

The State habeas judge found that in Brinkworth's Report: "Kumble appears to persist in his statement that he thought Mackey would be at his residence when he went there for dinner, and yet he admits that he thought if Karen [Gregory] drove up north with him that Mr. Mackey and she would meet in the Providence area and Mackey would drive her home." (R. 2424).

The latter admission of Kumble directly impeaches his contrary statements and supports the theory that he knew the victim would be alone the night of the murder and that his note was part of his cover-up to bolster his false claim that he thought the victim would be with Mackey. However, the State habeas judge denied relief based upon an assumption that if confronted with his statement to Brinkworth, Kumble would testify, as he did upon deposition, that the victim did not tell him Mackey would be out of town.

Once again, the State habeas judge improperly distinguished impeachment from exculpatory evidence. Had this impeachment evidence been available to the petitioner, the jury

could have found Kumble was not credible and had the opportunity to commit the crimes charged at a time when he knew Mackey would be out of town.

6.

As for Kumble's inconsistent statements about the broken glass and condition of the house, the State habeas judge improperly substituted her judgment for that of petitioner's counsel, opining that the defense was "better off having the jury wonder why Kumble didn't see the glass." (R. 2435). The testimony of petitioner's counsel at the State habeas hearing was precisely to the contrary. Counsel testified that the evidence not only impeached Kumble, it also supported the defense contention that the police had prematurely and wrongfully dropped their investigation against Kumble. (R. 3030-32).

The suppressed evidence was further evidence of Kumble's lack of credibility and showed he had something to hide. Kumble must have known something was wrong at the house during his visit yet he did not call the police or investigate. By pretending nothing was wrong, jurors could have found that he was covering up his first-hand inside knowledge.

7.

With regard to Mackey's letter which threatened the police for the lack of results, the State habeas judge found that Mackey's pressure on the police was "well known the defense." (R. 2428).

There is no evidence in the record, other than Mackey's suppressed letter, where he threatens to use his influence and the media against the police. The suppressed evidence was material to the petitioner's defense in two ways: first, the letter supported the petitioner's contention that the police were placed under pressure to arrest someone and thereby increase the odds of a mistake by arresting the petitioner before completing their investigation of Kumble and others; and second, the letter impeached Tosi who testified there was no pressure upon him or any officers.

8.

The State habeas judge found that the contamination of evidence was *Brady* evidence and its suppression was improper. However, the judge again played advocate and concluded that the absence of the evidence could also have been used to the prosecution's advantage.

The judge's speculation is wholly irrelevant. The evidence was highly material to the petitioner's claim that the contamination would explain the absence of evidence against Kumble or another perpetrator. That the State would respond with its own arguments (which can always be the case with suppressed evidence) does nothing to cure the *Brady* violation.

9.

As for Mackey's letter relating that Kumble suggested that the victim engaged in outside affairs and "set herself up" to be assaulted and killed, the State habeas judge ruled that Mackey did not testify at the State habeas hearing and his testimony would be inadmissible hearsay. (R. 2427, 2436). The judge's conclusion is a *non sequitur*. Obviously, at the very least, this evidence would have prompted an investigation by the defense. More likely, the evidence impeached Kumble. And at most, it was substantively admissible on the issue of Kumble's motive, intent and knowledge.

In sum, the State habeas judge's analysis cannot be squared with *Brady* and its progeny.

The Closeness of the Case

The weakness of the prosecution's case provides yet another compelling reason to reject the judicial materiality determinations made to date because even WITHOUT the evidence suppressed by the prosecution, there are sufficient reasons not to have confidence in the jury's verdict. Indeed, the trial judge himself, Judge Farnell, set aside the verdict in what he

expressly found was a "close case" and due to errors he perceived. Judge Farnell had the unique advantage of observing all of the witnesses and the conduct of the prosecution. Significantly, the petitioner's post-conviction *Brady* attack was rejected by a successor judge who did not have the benefit of Judge Farnell's observations. In *United States v. Agurs*, 427 U.S. 97, 114, 96 S.Ct. 2392, 2401, 49 L. Ed.2d 342 (1976), the Supreme Court of the United States noted that the state trial judge's determination of the *Brady* violation "in the context of the entire record" was "thorough and entirely reasonable" due in part to the judge's "firsthand appraisal of the record." By contrast, the result of the State habeas hearing in the petitioner's case would likely have been different if decided by Judge Farnell.

Judge Farnell was correct in ruling that the case was "close." The issue at trial boiled down to a credibility determination. The petitioner's statements and behavior are consistent with innocence. "Even innocent people may panic at a police investigation and try to lie their way to safety." *United States v. Myers*, 892 F.2d 642, 649 (7th Cir.1990). Moreover, the petitioner has no criminal background, did not know the victim, and had no motive to kill or rape her. If the jury had the benefit of the suppressed evidence, the result could have been different. At the very least, the suppressed evidence would have significantly altered the investigation and preparation of the case by the petitioner's counsel, and consequently the defense heard by the jurors.

Reversal is warranted because the State's suppression of favorable evidence deprived the petitioner of a trial resulting in a verdict worthy of confidence.

II.

THE DISTRICT COURT FAILED TO MAKE A COLLECTIVE ANALYSIS OF THE ALLEGED *BRADY* VIOLATIONS.

As noted in Point I, the petitioner is entitled to federal habeas corpus relief upon a showing that the evidence concealed by the prosecution in violation of *Brady* was "material." In *Kyles*,

the Supreme Court held that such evidence is material is "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. The determination whether concealed evidence is material is not to be made item-by-item. Rather, the evidence the suppressed evidence must be considered collectively to determine if the "reasonable probability" test is met. *Kyles*, 514 U.S. at 436.

In the case at bar, the district court analyzed the concealed evidence item-by-item, as did the State habeas court. In fact, the district court's order denying habeas relief is essentially an adoption of the State habeas judge's order. Both judges did precisely that which *Kyles* prohibits, namely, conclude that each *Brady* violation failed to meet the test for materiality. Although each judge mentioned the *Kyles* requirement of collective analysis, neither judge engaged in such an analysis.

In *Kyles*, the Fifth Circuit addressed each alleged *Brady* violation individually and concluded that not one involved evidence that met the test for materiality. The Supreme Court reversed, rebuking the Fifth Circuit for engaging in "a series of independent materiality evaluations." The Supreme Court went on to conduct a *collective* analysis of that same evidence and ruled that so viewed, the suppression violated *Brady*. See *Kyles*, 514 U.S. at 441-54. See also *Schledwitz v. United States*, 169 F.3d 1003, 1012 (6th Cir.1999) (holding that although taken individually none of the undisclosed evidence was material, a new trial was required under *Kyles* because the *collective* exculpatory effect of the nondisclosed evidence raised a "reasonable probability" that the defendant was denied a fair trial).

Similarly here, the district court and State habeas judge engaged in the proscribed "series of independent materiality evaluations." When the suppressed evidence is collectively viewed, see Point I, it becomes evident that the petitioner was denied his right to a fair trial.

III.

THE PETITIONER HAS ESTABLISHED A VIOLATION UNDER *GIGLIO v. UNITED STATES*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

In *Giglio*, the Supreme Court held that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Id.* at 153, 92 S.Ct. at 766. In order to prevail upon a *Giglio* claim, the petitioner must show that the prosecutor "knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony," *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir.1995), and that the falsehood was material. *Brown v. Head*, 272 F.3d 1308, 1317 (11th Cir.2001). In order to demonstrate materiality, the petitioner's burden is less than that required to show materiality of a *Brady* violation.

> The materiality prong is easier to establish with *Giglio* claims than with *Brady* claims. For *Giglio* purposes, "the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'"

Brown, 272 F.3d at 1317 (quoting *Alzate*, 47 F.3d at 1110) (quoting in turn *Agurs*, 427 U.S. at 103, 96 S.Ct. at 2397)). See also *United States v. Arnold*, 117 F.3d 1308 (11th Cir.1997); *DeMarco v. United States*, 928 F.2d 1074, 1076 (11th Cir.1991). Cf. *United States v. Dickerson*, 248 F.3d 1036, 1042 (11th Cir.2001). A *Giglio* violation can take place even when the deliberate deception by the prosecution or false evidence pertains solely to the credibility of a witness:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate

> of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue, 360 U.S. at 269.

Here, the prosecution violated the above principles of law on at least three occasions. First, not only were the jurors deprived of the suppressed evidence against Kumble in violation of *Brady* as raised in Point I, the presiding trial judge sustained the prosecution's objection that the petitioner's counsel lacked a good faith basis for accusing Kumble and instructed the jurors to "disregard the last statement by [petitioner's] counsel" (T.3795). Thus, the jurors were, in effect, instructed by the trial judge, and misled by the prosecutor to believe, that the petitioner's counsel acted in bad faith when he suggested that Kumble was the murderer. The prosecutor, of course, knew better. The prosecutor was possessed of all the suppressed evidence against Kumble which would have provided petitioner's counsel with a good faith basis for the accusation against Kumble.

Second, during pretrial depositions by the defense, the evidence analysts for the State were asked by petitioner's counsel why debris collected from the murder scene was not analyzed. The deponents withheld the correct answer, namely, that the evidence had been contaminated. The prosecutor who was present at the deposition, Beverly Andrews, failed to correct the misleading and incorrect answers, even though she drafted the suppressed memorandum detailing the contamination. (R. 212, 2795-96, 3234-36).

Third, at the petitioner's trial, the prosecution sought to "exonerate" Kumble as the murderer and rapist by asking Tosi if Kumble gave any inconsistent statements to the police:

> PROSECUTOR: Did Mr. Kumble ever give you or any other law enforcement officers that you used specifically in this investigation an inconsistent statement?

DETECTIVE TOSI: None.

(T. 4167). Both the prosecutor and Tosi knew the answer was false as established by the suppressed evidence of Kumble's interview. This tactic of the prosecutor and Tosi was obviously designed to suggest falsely to the jury that Kumble must be innocent because he, unlike the petitioner, made no inconsistent statements. See *Su v. Filion*, 335 F.3d 119 (2d Cir.2003) (state prisoner entitled to federal habeas relief where false testimony was introduced to bolster credibility of key prosecution witness and there was no reasonable application of federal law under which it could be said that the prejudice fell short of Supreme Court precedent).

The petitioner is entitled to relief because there is a reasonable likelihood that the verdict could have been affected by: the bad faith objection by the prosecutor that there was no evidence to support an accusation against Kumble; and/or the false testimony that only the petitioner, and not Kumble, made inconsistent statements; and/or the false and uncorrected testimony that there was no impropriety with regard to evidence collected from the scene for analysis.

CONCLUSION

Based upon the foregoing, the petitioner respectfully requests that the district court's denial of the petitioner's requests for a writ of habeas corpus be reversed and the cause remanded with instructions to grant the writ and to order petitioner released unless the state affords him a new trial within sixty days.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief contains 12,281 words.

_____
PAUL MORRIS

Respectfully submitted,

LAW OFFICES OF PAUL MORRIS, P.A.
9130 S. Dadeland Blvd., Suite 1528
Miami, FL 33156
(305) 670-1441

_____
PAUL MORRIS
Counsel for George Lewis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed to Michelle Taylor, Office of the Attorney General, Concourse Center 4, 3507 Frontage Rd., Suite 200, Tampa, FL 33607 this 18th day of August, 2003.

_____

PAUL MORRIS

[FN1] The symbol "T" refers to the trial transcript contained within the record on appeal in *Lewis I*. The symbol "R" refers to the record on appeal in *Lewis II*. Both records were filed with the district court in support of the petitioner's application for habeas corpus relief. The two records were not assigned a docket entry number and are apparently reflected in the docket sheet as "6/20/03 -- Original Case Papers (1 volume of pleadings, 9 expandable folders, etc.").

[FN2] Similarly, Detective Tosi was asked whether the police had developed any information that Kumble had a romantic answered: "I'm not aware of a romantic attraction, sir." (T. 4121).

[FN3] The record is in conflict as to whether the composite drawing looks like Kuhar. Tosi would later testify it did not whereas the petitioner's counsel testified that the composite drawing was a "dead ringer" for Kuhar. (R. 1986). The prosecutors made the peculiar claim that the petitioner's composite drawing was of himself. (R. 2837).

[FN4] The Medical Examiner, a prosecution witness, testified that the murderer would have been covered in blood. (T. 3393).

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

GEORGE A. LEWIS

Appeal Case No. 96-04750
Criminal Case No.
CRC86-03400-CFANO

v.

STATE OF FLORIDA

ON APPEAL FROM THE CIRCUIT CRIMINAL COURT
OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF

SCOT E. SAMIS, ESQ.
Law Office of Ehrlich & Samis
4699 Central Avenue, Suite 102
St. Petersburg, FL 33713
(813) 321-4700
Fla. Bar #0651753
Attorney for Appellant

which he pressures the police department and points out the obvious indications that Kumble should be pursued. Finally, the Fischler confession would have added further support for the argument that the Gulfport Police failed to adequately investigate alternative suspects - even when those suspects made inculpatory statements. The Fischler violation removed yet another alternative suspect whom the defense could have pursued and argued to the jury.

The cumulative effect of this Brady evidence, taken as a whole, would have been to change the entire complexion of the trial, and the verdict. The denial of due process suffered by the Defendant in this difficult and troublesome case has finally gone beyond the pale, especially when one considers the numerous discovery violations which occurred shortly before and during trial which lead the original judge to order a new trial.

B. The Brady Violations

The issues addressed at the 3.850 hearing fell into four major factual areas: (1) matters pertaining to Kumble; (2) issues of contaminated evidence and inept investigation of the murder scene; (3) Fischler's "confession"; and (4) the suppressed FBI "profile" of the perpetrator. In denying the Defendant's 3.850 Motion, the court below addressed the issues in these separate categories as well.

1. - Matters Pertaining to Rumble

It is undeniable that the Brady evidence discovered from the public records request would have given the defense exactly what it needed to present Kumble as a viable suspect to the jury. In the absence of this evidence, the State's objection to that tactic was sustained by the trial court, effectively crippling that aspect of the defense. The Brady evidence would have allowed the defense to establish the following:

a. Rumble's romantic interest in the victim. At trial, Kumble characterized his relationship with the victim as "casual," and said that he did not know her very well. He specifically denied any romantic interest in the victim, and in fact testified that at the time of the offense he had a girlfriend, Maureen Byrnes. These statements were consistent with Kumble's deposition testimony, in which he described his relationship with Ms. Gregory as "very casual," describing a "distant" friendship, with no desire to make

the relationship intimate, sexual or romantic. It would have obviously been important to the defense theory to establish Kumble's romantic interest in the victim to support the defense theory at trial; i.e. that Kumble had made advances to the victim which were spurned, leading to the rape and murder.

The defense lawyers had attempted throughout pretrial discovery to obtain evidence of Kumble's romantic interest in the victim, but were prevented from doing so. During the deposition of the victim's friend, Anita Kilpatrick, the deponent was asked if Kumble had any "romantic infatuations" with the victim. She answered "No." We *now* know from the Brinkworth report that she told the police otherwise: according to that report, Kilpatrick told Brinkworth that Kumble had expressed "an enormous amount of desire and interest" in the victim. She had also told the victim's boyfriend, David Mackey, that Kumble had an "avid interest" in the victim. This essential evidence was withheld from the defense

APPENDIX E

IN THE CIRCUIT COURT FOR PINELLAS COUNTY,
FLORIDA
CRIMINAL DIVISION
CASE NO. CRC 86-3400CFANO-B

POLK COUNTY CASE NO. CF **87-2426A1-XX**

STATE OF FLORIDA

vs.

GEORGE A. LEWIS,

Defendant
----------/

ORDER GRANTING MOTION FOR NEW TRIAL

THIS CAUSE coming on to be heard on the Defendant's Motion for New Trial and Response to Defendant's Motion for New Trial, and the Court having heard extensive argument from counsel And being further advised in the premises, finds that the Motion for New Trial should be granted. This was a close case diligently litigated by the respective parties. A review of the record as a whole and the cumulative effect of the errors raised by the defense, leaves the Court to conclude that the best interest of justice requires the granting of a new trial. Specifically, the Court would grant the relief sought in paragraphs 17, 18, 19, 20, 21, 22, 32, 33, 41, 43, 46, 47, 48, 61,63, 66, and 67. Therefore, it is hereby ORDERED that said Motion for New Trial is hereby granted.

DONE and ORDERED in Chambers, Clearwater, Pinellas County, Florida, this 20th day of July, 1987.

_____
CROCKETT FARNELL
Circuit Judge

(2)
Supreme Court, U.S.
FILED
041215 FEB 23 2005
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GEORGE ALAN LEWIS,

Petitioner,

v.

JAMES CROSBY, CHARLIE CRIST, ATTORNEY GENERAL OF THE STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
LAW OFFICES OF
PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, Florida 33156
(305) 670-1441
Counsel for Petitioner

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SUPPLEMENTAL APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GEORGE ALAN LEWIS,

Petitioner,

vs. Case No.8:99-CV-2564-T-26B

MICHAEL W. MOORE,

Respondent.

_____/

ORDER

Before the Court is a petition for writ of habeas corpus filed by a Florida prisoner pursuant to 28 U.S.C. § 2254 challenging a judgment and sentence rendered by the Sixth Judicial Circuit Court, Pinellas County, Florida.

Background

Following a change of venue from Pinellas County to Polk County, Florida, Petitioner was tried by jury on June 2-14, 1987, and convicted of first-degree murder and sexual battery. The jury recommended a life sentence for the murder. The trial court entered an arrest of judgment on the sexual battery count and, while denying Petitioner's motion for judgment of acquittal and arrest of judgment on the murder count, awarded him a new trial on the charge based on cumulative errors.

The State appealed, contending that the trial court abused its discretion in granting a new trial and arrest of judgment. Petitioner cross-appealed, charging that the trial court erred in not granting a

judgment of acquittal on the murder charge. Finding that there was "substantial competent evidence that was consistent with [Petitioner's] guilt and with any reasonable hypothesis of his innocence," the appellate court denied Petitioner's cross-appeal, reversed the trial court's order on the sexual battery charge, and remanded the case. State v. Lewis, 543 So.2d 769, 769 (Fla. 2d DCA 1989).

On remand, Petitioner was convicted of first degree murder and sexual battery with a deadly weapon. Dkt. 1, Post-Conviction Proceedings, Vol. 1 at 5-6. Petitioner was sentenced to serve a term of life imprisonment on the charge of first degree murder and a term of twelve years imprisonment on the charge of sexual battery with a deadly weapon on June 2, 1989. Dkt. 1 at 2.

Petitioner filed a direct appeal asserting the following grounds for relief:

1. Whether Defendant's involuntary exclusion from portions of the jury selection process denied Defendant his right to due process under the Sixth and Fourteenth Amendments of the United States Constitution;

2. Whether the trial court abused its discretion in admitting into evidence several photographs of the decedent at the crime scene, a video tape of the crime scene prior to removal of decedent's body, and several morgue photographs;

3. Whether the trial court erred in convicting and sentencing Defendant for sexual battery with a deadly weapon when the jury returned a verdict for sexual battery; and

4. Whether defendant was denied his right to a fair trial and due process for the reasons set forth by Defendant in *State v. Lewis,* 543 So.2d at 760.

The appellate court affirmed Petitioner's conviction and sentence on June 8, 1990. His motion for rehearing was denied on September 4, 1990, with the mandate issuing on September 21, 1990. *Lewis v.*

State, 566 So.2d 270 (Fla. 2d DCA 1990). Dkt. 1, Post-Conviction Proceedings, Vol. 1 at 12. The Florida Supreme Court rejected Petitioner's request for discretionary review on March 13, 1991. *See Lewis v. State*, 581 So.2d 165(Fla. 1991).

On March 12, 1993, with the assistance of counsel, Petitioner filed a state application for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 (hereinafter "Rule 3.850"). Dkt. 1, Post-Conviction Proceedings, Vol. 1 at 19-26. Therein, Petitioner alleged that the prosecution withheld impeachment material and exculpatory evidence; the state attorney's office and the Gulfport Police Department withheld public records; and newly discovered evidence warranted granting him a new trial. The trial judge recused himself from the Rule 3.850 proceedings, and the parties stipulated to the reassignment of the case to the chief circuit judge for consideration of Petitioner's motion. Dkt. 18, Ex. 3.

Concluding that many of the allegations contained in the Rule 3.850 motion lacked merit, the trial court denied relief on all but six of Petitioner's claims in a pre-evidentiary hearing order entered on November 27, 1995. Dkt. 1, Post-Conviction Proceedings, Vol.13 at 1931. Following a four-day evidentiary . hearing on the remaining claims, the trial court entered a thorough and well-reasoned twenty-five (25) page order on September 26,1996, finding that Petitioner had failed to demonstrate that he was entitled to post-conviction relief on the following claims:

1. The State suppressed a sworn statement taken from Maureen Byrnes by two prosecutors on July 19, 1984;

2. The State suppressed a letter dated September 7, 1984, written by Mackey and sent to Tosi;

3. The State suppressed a memorandum dated September 18, 1985, which indicated that four bags of evidence seized from the crime scene were opened without authorization, deemed contaminated, and therefore not subjected to forensic analysis;

4. The State concealed all but the first two pages of a

22-page Supplemental Report of Detective Brinkworth containing interviews with Byrnes, Kilpatrick, Mackey, and Kumble;

5. The State suppressed evidence concerning suspect Steven Louis Fischler which included an investigative report; and

6. The State concealed an incriminating statement made by suspect Steven Louis Fischler.

Dkt. 1, Post-Conviction Proceedings, Vol. 13 at 1932.

The trial court rejected Petitioner's *Brady* claims as lacking merit based on the Supreme Court's holdings in *Brady v. Maryland,* 373 U.S. 83 (1963), and its explication of the *Brady* rule in *United States v. Bagley,* 473 U.S. 667 (1985) and *Kyles v. Whitley,* 514U.S. 419 (1995). Dkt. 18, Ex. 4. On August 7, 1998, the appellate court issued a written opinion affirming the trial court's decision denying Petitioner's motion for post-conviction relief in which it stated that "although favorable information was withheld from Lewis, it did not have the probability of changing the outcome of his trial." *Lewis v. State,* 714 So.2d 1201, 1203 (Fla. 2d DCA 1998). Dkt. 18, Ex. 7. The Florida Supreme Court denied Petitioner's request for discretionary review on November 25, 1998. *Lewis v. State,* 728 So. 2d 203 (Fla. 1998).

Petitioner filed the instant petition on November 8, 1999, raising six *Brady* claims and one *Giglio*[1] claim asserted in his Rule 3.850 motion. For reasons set forth *infra,* the Court finds that Petitioner has not demonstrated that he is entitled to federal habeas relief.

Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), signed into law on April 24, 1996, amended the statutes governing federal habeas relief for state prisoners. Although Petitioner was convicted in 1989, because he filed his petition after AEDPA's enactment, its provisions are applicable to his

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[1] ***Giglio v. United States, 405 U.S. 150 (1972).***

petition. *See Wilcox v. Florida Dep't of Corrs.*, 158 F.3d 1209, 1210 (11th Cir. 1998), *cert. denied,* 531 U.S. 840 (2000). Where a state court initially considers the issues raised in the petition and enters a decision on the merits, 28 U.S.C. § 2254(d) governs the review of those claims. *See Mobley v. Head,* 267 F.3d 1312, 1316 (11th Cir. 2001), *cert. denied,* U.S. ,122 .Ct. 2682, 153 L.Ed.2d 853 (2002) (finding that the court must deny the writ unless one of two § 2254(d)exceptions applies).

The new § 2254 creates a deferential standard for federal court review of state court adjudications. In pertinent part, § 2254(d) states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The Eleventh Circuit interpreted the new standard in Putman v. Head:

> The "contrary to" and "unreasonable application" clauses of § 2254(d)(1) are separate bases for reviewing a state court's decisions. See *Williams v. Taylor,* 529 U.S. 362, 404-05, 120 S.Ct. 1495, 1519, 146 L.Ed.2d 389 (2000). A state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forthby Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a

Supreme Court case. *See Bottoson v. Moore,* 234 F.3d 526, 531 (11th Cir. 2000).

> A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case. *See id.* An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context. *See id.* Notably, an "unreasonable application" is an "objectively unreasonable" application. *See Williams,* 529U.S. at 412, 120 S.Ct. at 1523.
>
> Lastly, § 2254(d)(1) provides a measuring stick for federal habeas courts reviewing state court decisions. That measuring stick is "clearly established Federal law." 28 U.S.C. § 2254(d). Clearly established federal law is *not* the case law of the lower federal courts, including this Court. Instead, in the habeas context, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision." *Williams,* 529 U.S. at 412, 120 S.Ct. at 1523.

268 F. 3d 1223, 1241 (11 th Cir. 2001) (footnotes omitted).

Because a state court initially considered the issues raised in the petition and entered a decision on the merits, § 2254(d) governs the review of Petitioner's claims. See *Mobley,* 267 F.3d at 1316. In a recent decision addressing the level of deference which should be accorded a state court decision under § 2254(d), the Supreme Court stated:

> A federal court's collateral review of a state court decision must be consistent with the respect due state courts in our federal system. . . . [however], deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.

Miller-El v. Cockrell, 2003 WL 431659, at *12 (U.S. Feb. 25, 2003).

A petitioner has the burden of overcoming all state court factual determinations by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

Evidentiary Hearing

The Court has carefully reviewed the record and concludes Petitioner is not entitled to an evidentiary hearing. *Smith v. Singletary, 170* F.3d 1051, 1053-54 (11th Cir. 1999). The pertinent facts of the case are fully developed in the record before the Court. *Cave v. Singletary,* 971 F.2d 1513, 1516 (11th Cir. 1992). Thus, no additional evidentiary proceedings are required. *High v. Head,* 209 F.3d 1257, 1263 (11th Cir. 2000), *cert. denied,* 532 U.S. 909 (2001) (citing *McCleskey v. Zant,* 499 U.S. 467, 494 (1991)).

Discussion

After his direct appeal was concluded, Petitioner submitted a request for public records to the Gulfport Police Department and the Florida state attorney's office, Sixth Judicial Circuit, Pinellas County, Florida. Material he received in response to his request revealed the existence of several case-related documents which were not previously disclosed to him. In his petition, Petitioner asserts that the State's failure to provide him copies of said documents and prosecutorial misconduct warrant granting him federal habeas relief. Petitioner makes the following assertions in support of his petition:

> The trial court misread the facts, failed to evaluate the suppressed evidence collectively, erroneously engaged in a sufficiency of the evidence analysis, and applied the wrong standards for determining materiality. The result is a decision that is contrary to and involved an unreasonable application of clearly established decisions of the Supreme Court of the United States

> and a decision that is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings, thereby entitling the petitioner to relief under 28 [sic] U.S.C. § 2254(d)(1) and/or (d)(2).

Dkt. 14 at 40.

Respondent argues, to the contrary, that under the provisions of § 2254(d), Petitioner is not entitled to federal habeas relief. Respondent contends that Petitioner had an opportunity to fully develop the factual basis for his claim during his post-conviction proceedings and was afforded an opportunity to present evidence on his behalf in support of his *Brady* claims during a full and fair evidentiary hearing. Respondent also argues that Petitioner failed to exhaust his claim that the trial court erred in reaching its findings in his post-conviction proceedings. The Court finds that Respondent's exhaustion argument lacks merit. Petitioner's claim that the trial court's findings are erroneous was exhausted when it was presented to the state appellate court.

Having reviewed the record, the arguments presented by the parties in their briefs, applicable statutes and controlling case law, the Court finds that Petitioner's claims lack merit. The trial court held a four-day evidentiary hearing and thereafter entered a thorough and well-reasoned, twenty-five page order finding that Petitioner had failed to demonstrate that he was entitled to post-conviction relief on these claims.

Six of the claims Petitioner asserts in his federal habeas petition as grounds for relief are based on the Supreme Court's holding in *Brady v. Maryland,* 373 U.S. 83, 87 (1963)(holding that "[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."). Although the trial court did not specifically address Petitioner's *Giglio* claim in its written order denying his Rule 3.850 motion, the trial court's denial of the motion indicates that it considered and decided the claim adversely to

Petitioner. *See Ogle v. Estelle,* 592 F.2d 1264, 1268 (5th Cir. 1979)[2] (quoting *Smith v. Digman,* 434 U.S. 332, 333 (1978) (finding that "a district court commits plain error in assuming that a habeas petitioner must have failed to raise in the state courts a meritorious claim that he is incarcerated in violation of the Constitution if the state appellate court's opinion contains no reference to the claim."). "[E]ven if the court did not decide the issue, it was afforded a full and fair opportunity to do so in compliance with § 2254." Id.

Brady Claims

As discussed *infra,* the trial court set out the four-prong test enunciated in *Brady* and its progeny, examined each of Petitioner's claims individually, and then collectively, and found that "the State was in possession of certain statements, reports and letters that were not provided to the Defendant [which] are favorable to [him] and ... could not have been obtained by using reasonable diligence." The trial court concluded, nonetheless, that there is not a reasonable probability that another trial would produce a different outcome.

To establish *a Brady* violation, the defendant must show that (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense, or exculpatory; (3) the evidence was not in the possession of the defense and could not have been obtained by using reasonable diligence; and (4) the evidence was material. *Brady,* 373 U.S. at 87; *see also United States v. Massey,* 89 F.3d 1433, 1443 (11th Cir. 1996); *United States v. Starrett,* 55 F.3d 1525, 1555 (11th Cir. 1995).The *Brady* rule applies to both exculpatory as well as impeaching evidence. *United States v. Bagley, 473* U.S. 667 (1985). Favorable evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley,* 514 U.S. 419, 434 (1995) (citing *Bagley,* 473 U.S. at 682). In other words, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. *Id.* at 437. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* at 434 (citing

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[2]Fifth Circuit decisions handed down prior to October 1, 1981, are binding precedent upon this Court. See *Bonner v. City of Pritchard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

Bagley, 473 U.S. at 678). In evaluating materiality, suppressed evidence must be evaluated collectively. *Id.* at 436; *McMillian v. Johnson,* 88 F.3d 1554, 1567 (11th Cir. 1996).

"The Government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *United States v. Meros,* 866 F.2d 1304, 1309, *cert. denied,* 493 U.S. 932 (1989) (quoting *United States v. Valera,* 845 F.2d 912, 927-28 (11th Cir. 1988)). Thus, matters known to the defense are not matters within the parameters of the *Brady* decision. Likewise, a matter is not suppressible for *Brady* purposes if the defense had access to it. *Halliwell v. Strickland,* 747 F.2d 607 (11th Cir. 1984), *cert. denied,* 472 U.S. 1011 (1985). Finally, a Brady violation is subject to a harmless error analysis. *Strickler v. Greene,* 527 U.S. 263 (1999) (finding that the failure of the prosecution to disclose an investigator's notes and letters relating to witness interviews which would have been useful for impeachment is subject to harmless error analysis and does not assure a right to relief under *Brady).*

Petitioner's defense was that someone other than himself had committed the crimes with which he was charged. The crux of the petition is that had Petitioner had the information withheld by the State, he would have been able to effectively impeach the testimony of Peter Kumble (hereinafter "Kumble") and establish that the State had "bungled" the investigation.

Claim One

In his first claim for relief, Petitioner asserts that the State suppressed "a sworn statement taken from Maureen Byrnes by two prosecutors on July 19, 1984," which would have been useful for impeachment of Kumble. Dkt. 14 at 52-53. In a sworn statement given to the state attorney, Ms. Byrnes said that Kumble told her that the victim had been "raped and murdered" before the police released that information to the public. Petitioner asserts that he would have used this information to establish that Kumble was a viable suspect for the murder. When Petitioner raised this issue during his state post-conviction proceedings, the trial court found as follows:

> There is no doubt this statement was in possession of the state. It was taken by two assistant state

> attorneys on July 19, 1984, and transcribed on August 5, 1984. In this statement, Ms. Byrnes says unequivocally that when Mr. Kumble called her on Thursday night, after he talked on the phone to Detective Brinkworth, he told her Karen Gregory had been raped and killed.(Exhibit 11, p. 11) (emphasis in original).
>
> At the Evidentiary Hearing, Ms. Byrnes admits she used the term raped and murdered in her sworn statement, but says she doesn't know if Kumble actually used the words raped and murdered or if she was trying to be helpful and relying on information she had heard or learned over time since the murder. She says she actually had these doubts at the time she gave her statement, but was unsure if she was allowed to contradict what she had just said. (Byrnes, 3.850 Hearing, pages unknown). She further says on cross examination that she is sure Kumble said Ms. Gregory had been "murdered",but is not sure he said "raped." She also says she is sure she knew from some source, prior to her statement, that Ms. Gregory had been raped as well as murdered. (Byrnes, 3.850 Hearing, pages unknown).
>
> The state clearly should have turned over the Byrnes statement to the defense, . . . The admissibility of the Byrnes statement is entirely different, however.

Dkt. 18, Ex. 4 at 7-9. Finding Ms. Byrnes' sworn statement "an evidentiary nightmare," the trial court concluded that the statement did not meet the *Brady* test because it would have been inadmissible as substantive evidence in the trial or for impeachment purposes given Ms. Byrnes' testimony during the Rule 3.850 evidentiary hearing that at the time she gave the statement she did not know if Kumble actually used the words "raped and murdered or if she was trying to be helpful and relying on information she had heard or learned over time since the murder." Dkt. 18, Ex. 4 at 8.

Also lacking merit is Petitioner's argument that the trial court erred in finding that the statement was not material because it was inadmissible under the Florida Evidence Code. Petitioner argues that inadmissible evidence is material under *Brady* if it would have a direct impact upon the preparation and investigation of the defense. In

addressing this issue, the Eleventh Circuit held as follows:

> Furthermore, it is clear that the Florida Supreme Court did not unreasonably apply the *Brady* standard when it found that this inadmissible evidence was not material. *Brady's* materiality standard defines evidence as "material" only if there is a reasonable probability that its disclosure would have affected the outcome of the proceeding. *Bagley, 473* U.S. at 682, 105 S.Ct. 3375. Inadmissible evidence could only rarely meet this standard – indeed, no Supreme Court case, either before or since the Florida Supreme Court's decision in *Breedlove II,* has found inadmissible evidence was material for *Brady* purposes. In light of this fact, it was certainly not objectively unreasonable for the Florida Supreme Court to assume that inadmissible evidence, such as the evidence at issue in *Breedlove 11,* was not material under the standard articulated in *Bagley.*

Breedlove v. Moore, 279 F.3d 952, 963-64 (11thCir. 2002), *cert denied,* 2003 WL 397962 (U.S.) (footnotes omitted). See also *Delap v. Dugger,* 890 F.2d 285, 298 (11th Cir. 1989) (finding that evidence of unrelated illegal activity by a police officer testifying for the state would likely not have been admissible under Florida's law of evidence, and thus immaterial for *Brady* purposes). The trial court's decision that the allegedly suppressed evidence was inadmissible was completely consistent with Florida evidentiary law in 1987, and cannot be disturbed by this Court. *Breedlove,* 279 F.3d at 964.

The trial court properly identified the Brady standard and analyzed this claim applying the standard as explicated by the Supreme Court in *Bagley and Kyles.* Its decision is not contrary to or an unreasonable application of federal law or an unreasonable application ofthe facts in light of the evidence presented.

Claim Two

In claim two, Petitioner asserts that the State suppressed "a letter dated September7, 1984, written by Mackey and sent to Tosi" which could have been used to impeach Kumble and to support the defense's claim that the State had been pressured into charging Petitioner. Dkt. 14 at 20. In addressing this claim, the trial court stated:

> This letter should have been given to the defense in its

entirety as discovery, whether it contains *Brady* information or not.

> ...
>
> The fact that David Mackey exerted pressure on the police to solve this case was well known to the defense. (Mackey deposition, pp. 97 -111). They used this pressure at trial to the Defendant's advantage. The defense was well aware that Kumble was a suspect and exploited this fact at trial. (R. 4120 - 4124, e.g.). The real *Brady* information in the letter is the information, not known to the defense, that Marie Byrnes had indicated Kumble had told her Karen Gregory was raped and murdered immediately after talking on the phone to Detective Brinkworth. Mackey, of course, could not testify regarding this, as it would be hearsay.
>
> Therefore, although the state should have provided this Mackey letter in discovery, it is not a *Brady* violation that will bring the Defendant any relief.

Dkt. 18, Ex. 4 at 10. As stated *supra,* issues raised by the Byrnes statement were addressed by the trial court in its finding that the statement did not meet the *Brady* test. The trial court's finding that this claim is likewise without merit is not contrary to or an unreasonable application of federal law or an unreasonable application of the law to the facts. *See* 28 U.S.C. § 2254(d). Petitioner has also failed to overcome the presumption of correctness accorded trial court findings of fact pursuant to 28 U.S.C. § 2254(e).

Claim Three

In this claim, Petitioner asserts that "[t]he State suppressed a memorandum dated September 18, 1985, which indicated that four bags of evidence seized from the crime scene were opened without authorization, deemed contaminated, and therefore not subjected to forensic analysis." Dkt. 14 at 21. According to Petitioner, he would have used this information to support his claim the State had "bungled" the investigation, preventing him from having access to evidence which might support his claim that someone other than himself was present in the house on the night of the murder. *Id.* In

addressing Petitioner's contaminated evidence claim, the trial court found as follows:

> Since much of the Defendant's strategy at trial centered around the "bungled investigation" defense, this information was favorable to the Defendant, and would presumably have been explored in the trial by defense counsel had they been made aware of it.
>
> The state should have revealed this and failure to do so is a *Brady* violation.
>
> The defense would have pursued the fact that four bags of debris gathered from a pair of shorts, a pillow case, a sheet, and a mattress pad were not examined because Detective Tosi had opened the bags prior to their re-submission to Technician Hensley. This would be admissible testimony. They would then add this additional "bungling" to the other examples they use in their closing argument... .
>
> This would be proper closing argument. However, it is dangerous. The defense can and did make much ado about no hairs and fibers of George Lewis being found at the scene of the crime. . . . Since these items were bedroom items, not located where George Lewis says he went that night, it would seem allowing the jury to speculate as to whose hairs might be in those bags -- Kumble's or those of George Lewis -- might inure to the benefit of the state.

Dkt. 18, Ex. 4 at 11-12; 18-19.

As the trial court noted in its decision denying Petitioner's Rule 3.850 motion, he asserted his "bungled investigation" defense throughout the trial, and during closing, he reinforced his argument that the investigation was not conducted properly by citing numerous alleged examples of a contaminated crime scene, missing evidence, and oversights and mistakes by investigators and members of the forensic team for the jury's consideration. *See, e.g.*, Dkt. 1, Trial Transcripts, Vol. 12 at 4537; 4549; 4553; 4557; 4561;4563; 4565; and

4571. A review of the trial transcript reveals that the trial court's observations are correct. Petitioner actually bolstered his claim of innocence by pointing to the absence of either hair or fiber evidence placing him inside the house at the time the murder occurred. Dkt. 1, Trial Transcripts, Vol. 12 at 4570.

Applying the *Brady* standard and guided by the Supreme Court's decisions in *Kyle* and *Bagley,* the trial court found that disclosure of this information was not material under the standard articulated in *Bagley.* Suppressed information is not material unless there is a "reasonable probability" that had the information been disclosed the result at trial would have been different. *See Wood v. Bartholomew,* 516 U.S. 1, 5 (1995). *See also United States v. Amiel,* 95 F.3d 135, 145 (2d Cir. 1996) (finding that "[s]uppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." (internal quotation omitted)). The trial court correctly found that no reasonable probability exists that the disclosure of this evidence would have affected the outcome of Petitioner's trial. Petitioner has again failed to overcome the burden imposed by 28 U.S.C. § 2254(d)-(e). This Court finds, therefore, that this claim lacks merit.

Claim Four

In this claim, Petitioner asserts that "[t]he State concealed all but the first two pages of a 22-page Supplemental Report of Detective Brinkworth (See Dkt. 1, Post-Conviction Proceedings, Vol. 2 at 100) containing interviews with Kilpatrick, Mackey, and Kumble" which Petitioner asserts could have been used to impeach Kumble. Dkt. 14 at 21; 56-59. According to Petitioner, the suppressed report contained information regarding Kumble's alleged romantic interest in the victim, *id.* at 21, Kumble's activities the night the murder occurred, *id.* at 22, statements he made to Detective Brinkworth regarding the reason for his visit to the house on the evening following the murder, *id.* at 23, and observations he made during the visit, *id.* at 23-24. In addressing this claim, the trial court made the following findings:

> Exhibit 6 was in the possession of the State Attorney's Office. It was not provided to the defense, except for pages 1 and 2 which were given to the defense during

> the trial. Some of the matters contained in the report may have been favorable to the Defendant, ... Some of the information contained in Exhibit 6 was not in the possession of the Defendant, and could not have been obtained by the use of reasonable diligence by his lawyers.
>
> Both the state and defense concede that written reports containing material impeachment of material witnesses are *Brady* information and must be turned over to the defense.

Dkt. 18, Ex. 4 at 2. The trial court correctly examined each claimed violation under the *Brady* standard, before concluding that the claims lacked merit.

In addressing Petitioner's allegation that the report could have been used to impeach Kumble's testimony regarding his alleged "romantic interest" in the victim, the trial court found that:

> Detective Brinkworth told the defense about Ms. Byrnes' statement. (Brinkworth deposition, pp. 34 and 36). He also told them Kilpatrick had indicated Kumble had an interest in Ms. Gregory. (Brinkworth deposition, p.19 and 27). The defense had a great deal of information about Mr. Mackey's and Ms. Kilpatrick's (and even Ms. Gregory's) thoughts on this matter. (Mackey deposition pp. 31, 35 - 36, 38 - 39, 41, 43, and 45). The defense knew Mr. Kumble had walked on the beach with Ms. Gregory the night after she and Mackey had broken up. (Ciarciaglino testimony, 3.850 hearing, pages unknown). They also knew that despite what Kumble said, he and Byrnes had broken up prior to the homicide. (Brinkworth deposition, p. 36).
>
> ...
>
> This court finds, therefore, this purported *Brady* information was either known to or reasonably could have been obtained by the defense using reasonable

diligence and, therefore, this is not a *Brady* violation.

Dkt. 18, Ex. 4 at 3-4. This finding is consistent with federal law. *See Meros,* 866 F.2d at1309.

The trial court then addressed statements contained in Detective Brinkworth's report regarding Kumble's "alibi," finding as follows:

> There is nothing in Exhibit 6 that the defense did not know at the time of the first trial regarding [Kumble's] "alibi." . . . . There is no favorable *Brady* information here. When a person is asked to relate what he did on a given day/night, he is not going to relate what he didn't do unless asked. When asked by Brinkworth if he attended his yoga class, he readily admitted he did not and gave an explanation of why he did not. (Exhibit 6, p. 16). He was never asked by Brinkworth about the canceled concert. There is no *Brady* violation here.

The purpose of the decision in *Brady is* to insure that defendants constitutional rights arenot violated by governmental abuses of the discovery process. Where there was no information withheld from the defendant, there can be no *Brady* violation.

Petitioner also asserted that failure to produce the Brinkworth report constituted a *Brady* violation because references were made in the report to Kumble's explanation of his activities on the night in question, particularly regarding a visit to the victim's home. In assessing this claim, the trial court found as follows:

> The defense claims Kumble related different versions of the events when he went by the victim's house, the night after the murder.
>
> The first version, they claim, was on the note, where Kumble makes no mention of dinner. The defense had the note, so this is not a *Brady* claim.
>
> The second version, they claim, is in the Brinkworth

> report where Kumble calls when the body is found and tells Brinkworth that he was at the Mackey residence on Wednesday and was there to have dinner and return a tape. . .. [It couldn't be used to impeach Kumble, who testified in his deposition that his purpose in going to the Mackey house on Wednesday was both to have dinner and to return a tape. (Kumble deposition, 1, p. 28). If Kumble testified differently at trial, he could easily have been impeached from his own deposition. This does not provide *a Brady* claim. Additionally, all this information is in the first two pages of the Brinkworth report which was given to the defense at trial. They could have used it for whatever worth it was to them during the trial. Since they had it, albeit late, it cannot now be the basisof a *Brady* claim.

Dkt. 18, Ex. 4 at 4-5. Again, this is consistent with federal law under *Brady*. *See Meros,* 866 F.2d at 1309.

The trial court also correctly found that "the defense claims that Kumble's deposition and trial testimony regarding what he said to Brinkworth over the phone differed" were without merit because "the defense had . . . the Kumble deposition and were at the trial. . . This cannot be the basis of a *Brady* claim." Dkt. 18, Ex. 4 at 5. The trial court's decisionis consistent with federal law. *See Meros,* 866 F.2d at 1309.

Addressing Petitioner's assertion that if he "had had the Byrnes statement (Defendant's Exhibit 12), [Petitioner] could have shown that Kumble didn't tell her in his call to her that he had gone to the Mackey house for dinner, but only to return the tape," the trial court found that the claim was without merit:

> The last portion of the defense argument regarding Kumble's planned activities with the victim on May 23rd deals with differences in the deposition testimony and trial testimony of Mr. Kumble. They had the deposition and heard the trial testimony. They could have impeached him had they chosen to do so. This is not a *Brady* violation.

Dkt. 18, Ex. 4 at 6.

The trial court found that the fact that during a discussion with Brinkworth after returning from vacation, Kumble "forgot to mention the dinner plans until reminded is similar to the same

omission on the note,[3] which the defense did have and used at trial." Dkt. 18,Ex. 4 at 3-4.

Finding Detective Brinkworth's deposition "full of inaccuracies regarding his interview with Mr. Kumble on June 12, 1984," the trial court concluded that "[h]is report of that interview should therefore have been given to the defense. However, once again, had the defense had this report, it could
have been used principally to impeach Brinkworth, not Kumble. Since the state never got into this interview, the rules of evidence in existence at the time of the trial (1987) would not have allowed the defense to call Brinkworth and then impeach him."

When law enforcement personnel arrived at the crime scene, they discovered that glass panels were broken in the jalousie door, and there was glass on the walkway leading away from the house toward the street. Kumble testified that he did not "recall" seeing anyglass on the ground outside the door to the victim's house on the night he went there for dinner and discovered that nobody was at home. Dkt. 1, Trial Transcript, Vol. 8 at 3784. During his initial interview, however, Kumble told Detectives Brinkworth and Reed that he did see broken glass. Dkt. 18, Ex. 5 at 116. *See* Dkt. 1, Post-Conviction Proceedings, Vol.4 at 537.

The trial court found that there was an inconsistency as to whether or not Kumble saw the glass. According to Kumble's trial testimony and the depositions of Detective Brinkworth and Kumble, at the time he visited the house he sees no glass. The Brinkworth report (Exhibit 6) clearly indicates that Kumble not only saw glass, but further thought the Mackey house seemed 'out of character' having broken glass when it was so well kept other than that." Dkt. 18, Ex. 4 at 6. The trial court found, however, that the defense "could have impeached Kumble with the testimony of either Detective Reed or Morey Bornstein, who was Kumble's attorney . . . . Kumble was willing to waive the attorney/client privilege.... Mr. Bornstein's notes appear to suggest that his client indicated in the interview he had seen glass." Dkt. 18, Ex. 4 at 7 (citation omitted). Testimony by

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[3]Kumble left a note on the windshield of one of the two vehicles parked in the driveway at the victim's house the night he arrived for dinner and found nobody at home.

Petitioner's trial attorney confirms that he had a copy of Mr. Bornstein's notes and was aware of the reference to glass in the notes, but found the statement "ambiguous." Dkt. 1, Post-Conviction Proceedings, Vol. 20 at 3044-45.

Next, Petitioner asserted that what Detective Brinkworth said to Kumble regarding the victim's death during their telephone conversation the night the body was discovered was material when considered in conjunction with Ms. Byrnes' statement regarding Kumble's report to her that the victim was "raped and murdered" before that information was made public. The trial court found that "[t]here is no dispute that the defense was given the first two pages of Brinkworth's report....Even though the word 'untimely' does not appear in his report, it does appear he told Kumble he was there on an 'investigation reference the death of Karen Gregory.' Since the defense had the two pages of the report, albeit late, there is no *Brady* claim." Dkt. 18, Ex. 4 at 7. See *Meros,* 866 F.2d at 1309.

The trial court also found that "the fact that Kumble failed to explain his whole evening's activities to Detective Brinkworth during that conversation, or even later until being reminded by Brinkworth is of little note. When asked, he readily admitted he had had dinner with Ms. Byrnes that evening and had called her after he had talked to the police when he called the Mackey residence and learned that Karen was dead. This was well known to the defense, and thus cannot be the basis of a *Brady* claim." Dkt. 18, Ex. 4 at 6-7. See *Meros,* 866 F.2d at 1309.

Petitioner adopted a strategy for his defense. The fact that the jury was not persuaded by trial counsel's arguments does not render his conviction unconstitutional. This is not a case in which the prosecution depended "almost entirely on the testimony of one witness, without whom there would be no indictment or evidence to carry the case to the jury." *See Kelley v. Singletary,* 222 F.Supp. 1357, 1364 (S.D. Fla. 2002) (withheld report was material because it revealed co-defendant's agreement to testify *if* he could begranted immunity from prosecution) (emphasis in original).

The trial court's finding is not contrary to or an unreasonable application of clearly established Supreme Court law or an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. 2254(d). Petitioner has also failed to overcome by clear

and convincing evidence the presumption of correctness accorded the trial court's factual findings pursuant to 28 U.S.C. § 2254(e). Thus, the trial court's decision that this claim is without merit must stand.

Claims Five and Six

Both of these claims relate to the investigation of one of the victim's co-workers, Steven Louis Fischler (hereinafter "Fischler"), as a suspect. Following the murder, a schematic drawing belonging to Fischler was found inside the victim's home. Petitioner asserts that the State failed to disclose an investigative report which named Fischler as a possible suspect (Dkt. 14 at 24) and a statement made by Fischler during a polygraph examination (Dkt. 14 at 25).

During the early stages of the investigation, the police interviewed Fischler, gave him a polygraph examination, obtained his prints and hair samples, and included his photograph in a photo array shown to Petitioner. Fischler was eliminated as a suspect because his hair and prints did not match those found inside the house, the polygraph was inconclusive, and when shown Fischler's photograph, Petitioner stated that he was not the "stranger" Petitioner saw on the victim's lawn shortly after he heard a scream coming from the house on the night of the murder.

During the evidentiary hearing, Former Detective Scott Barnes testified that he was in an adjoining room while Fischler was taking a polygraph test in 1984 and overheard Fischler state to Brentnell, "Okay. I did it." Dkt. 1, Post-Conviction Proceedings, Vol. 17 at2516. Barnes communicated this information to Attorney Paver in 1990. *Id.* at 2510.

After hearing testimony during the evidentiary hearing, the trial court found that the police report documenting information obtained from Fischler's co-workers about their impressions of him and the statement made by Fischler during the polygraph post-test interview stating either "okay, I did it, or "maybe I did it, maybe I didn't" were not disclosed to the defense. The trial court found that this information should have been made available to the defense; but it also found that the defense knew Fischler had been investigated as a suspect and polygraphed and that Petitioner himself had stated that Fischler was not the"stranger" on the lawn.

In its decision, the trial court addressed Petitioner's assertion that Fischler's statement and the investigative notes should not be

barred as hearsay because they would be offered for the fact that this was information the police had but failed to act on, rather than for the "truth" of the matter. The trial court found that it was doubtful whether "any judge would allow into evidence Fischler's hearsay statement or hearsay investigative notes loaded with inadmissible character evidence -- he's 'weird,' gives me the 'creeps,' etc." Dkt.1, Post-Conviction Proceedings, Vol. 2 at 177-78.

A review of the suppressed police report reveals that there is no mention in the report of contact of any nature between Fischler and the victim. *Id.* Petitioner does not argue that suppressed police reports show that Fischler had the motive, or opportunity, or was implicated in the crimes by evidence gathered during the police investigation.

Testimony presented during the evidentiary hearing supports the trial court's conclusion that the statement made to the polygraph examiner was "both preceded and followed by adamant denials, and apparently made facetiously by someone who was 'pissed off' . . .when he made the statement. . . , Fischler didn't believe he was seriously subjecting himself to criminal liability when he made it, nor do the circumstances surrounding his statement suggest he 'believed it to be true.'" Dkt. 18, Ex. 4 at 19. The trial court's decision is supported by both federal and state law. *See Chambers v. Mississippi,* 410 U.S. 284 (1973); *Sliney v. State,* 699 So.2d 662, 670 (Fla. 1997) (affirming trial court's decision to preclude testimony of inmates incarcerated with nontestifying co-participant in robbery during which capital murder occurred because it was not sufficiently trustworthy). Finally, Petitioner has not shown any tangible evidence of a connection between Fischler and the murder for which Petitioner was convicted.

"The crucial inquiry is whether there is evidence in the record that establishes a 'reasonable probability' that the production of the inadmissible evidence would have resulted in a different outcome at trial." *Wright v. Hopper,* 169 F.3d 695, 703-04 & n.1 (11th Cir. 1999).

> [F]or prejudice to exist, we must find that the evidence--although itself inadmissible--would have led the defense to some admissible evidence. *See Bradley v. Nagle,* 212 F.3d 559, 567 (11th Cir.2000). Petitioner never has

> pointed out what admissible impeachment or exculpatory evidence would have been discovered if these documents had been turned over. "A court cannot speculate as to what evidence the defense might have found if the information had been disclosed." *Wright v. Hopper,* 169 F.3d 695, 703 (11thCir.1999). We conclude that the prosecutor's notes of witness statements could not have led the defense to impeachment or exculpatory evidence.

Williams v. Moore, 222 F.3d 1177, 1183 (11thCir. 2000), *cert. denied,* 534 U.S. 903 (2001). As in *Williams,* Petitioner failed to show that the inadmissible evidence would have led to admissible evidence.

The trial court examined each of Petitioner's claims both individually and collectively in arriving at its decision that there was no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. "[S]trictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler,* 527 U.S. at 281 (citation omitted); *see also Kyles,* 514 U.S. at 434, 436; *McMillian, 88* F.3d at 1567.

In analyzing Petitioner's *Brady* claims, the trial court applied the test enunciated in clearly established federal law as determined by the Supreme Court of the United States. "In the post AEDPA era, [federal habeas courts] do not conduct an independent review of claims that have been addressed on the merits by the state courts." *Breedlove v. Moore*, 279 F.3d 952 (11thCir. 2002). Having carefully reviewed the record in this case, the Court finds that the trial court's adjudication of this claim did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. Neither is the decision based on an unreasonable determination of the facts in light of the evidence presented in the statecourt proceedings. *See* 28 U.S.C. §2254(d). Petitioner is not entitled to federal habeas relief on this claim.

***Giglio* Claims**

Petitioner claims that there is a "reasonable likelihood" that the verdict was affectedby "the bad faith objection by the prosecutor that there was no evidence to support an accusation against Kumble;

the false testimony that only the petitioner, and not Kumble, made inconsistent statements; and the false and uncorrected testimony that there was no impropriety with regard to evidence collected from the scene for analysis." Dkt. 14 at 49.Petitioner cites *Brady v. Maryland,* 373 U.S. 83 (1963) ; *Giglio v. United States,* 405 U.S. 150 (1972); *United States v. Alzate,* 47 F.3d 1103, 1110 (11th Cir. 1995)), *cert. denied,* 531 U.S. 861 (2000); *United States v. Arnold,* 117 F.3d 1308 (11th Cir. 1997); *and DeMarco v. United States,* 928 F.2d 1074, 1076 (11th Cir. 1991), in support of his assertion that he is entitled to a "more relaxed materiality standard because the prosecution's case included perjured testimony, or at the very least, testimony which the prosecution knew was false and failed to correct." In this circuit, the materiality standard set out in *Brady is* applicable to the evaluation of materiality in a *Giglio* claim. *See United States v. Dickerson,* 248 F.3d 1036,1042 (2001) (citation omitted). "The materiality element is satisfied if the false testimony "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 1041.

Bad Faith Objection

Petitioner asserts that the prosecutor acted in bad faith by objecting to a question trial counsel propounded to Kumble. This claim is lacking an essential element for a *Giglio* claim — false testimony. The crux of the claim is an allegation of prosecutorial misconduct. The first step in examining the claim must be to place the comment in context. See *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974) (finding that examination of the entire proceedings in the case did not support the contention that the "prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process."). The following exchange occurred during the trial:

Defense: Isn't it a fact, sir, that on Tuesday evening, you and Mr. Kuhar were out for the evening and you went by the Mackey residence?

Kumble: No, that's not a fact.

Defense: You stopped there to see Ms. Gregory. You made advances. She became angry with you, and you killed

her.

Kumble: No, sir.

State: Excuse me a second. I want — that's improper for this lawyer to ask a question that he has absolutely no good-faith basis to put that on before this jury. And that's why I want the Court to instruct that jury to disregard that question.

Court: Sustained.

Ladies and Gentlemen, you should disregard the last statement by Counsel.

Defense: May I respond? I have a good-faith belief that — Judge, I'd like to give argument here.

State: I think the lawyer has been permitted to go far enough. I ask that comment also be disregarded by this jury.

Court: Well, I will very candidly say, so we may end this, the lawyers, two lawyers are both getting out of hand.

Dkt. 1, Trial Transcripts, Vol. 8 at 3795.

Without further comment, the jury was removed from the courtroom. Trial counsel then made several motions for a mistrial, one of which was based the prosecutor's statement that he had no good faith basis for the accusation that Kumble committed the murder. Dkt. 1, Trial Transcripts, Vol. 8 at 3795-3805. Trial counsel argued that the comment was a personal attack, and as a result, he no longer had any credibility before the jury. This motion was denied, with the trial court judge noting that a curative instruction had been given, and trial counsel had rebutted the statement in the presence of the jury. Dkt. 1, Trial Transcripts, Vol. 8 at 3804. The trial court also denied trial counsel's request for another curative instruction addressing the objection, stating: "I don't think the comment should have been made

in front of the jury. I don't think the question should have been asked. And, again, two ... wrongs don't make a right. So your motion is denied ... I told them before the jury was taken out to disregard all of you." *Id.* at 3804-05.

The prosecutor's objection was proper under both federal and state law. Counsel is not allowed to ask questions which suggest a certain set of facts in the absence of a goodfaith belief that those facts are true. *See Michelson v. United States,* 335 U.S. 469, 481 (1948) (stating that counsel should not ask "a groundless question to waft an unwarranted innuendo into the jury box."). See *also United States v. Tolliver,* 665 F.2d 1005, 1008 (11th Cir. 1982 (finding that "questions tending to incriminate or degrade a witness [are allowed] only where . . . counsel is in possession of some facts which support the belief that the witness committed the offense or degrading act to which the question relates."); *Carpenter v. State,* 664 So. 2d 1167, 1168-69 (Fla. 4th DCA 1995) (discussing good-faith requirement).

Moreover, the fact Kumble had been a suspect early in the investigation is no basis for an assertion that the prosecutor's objection to trial counsel's question was in bad faith. Under the circumstances, the prosecutor's objection, made with justification, did not so infect the trial with unfairness so as to constitute a denial of due process.

Kumble's Allegedly Inconsistent Statements

Petitioner asserts that the prosecutor presented false testimony or failed to correct testimony known to be false by allowing Detective Tosi's testimony that Kumble did not make inconsistent statements to the investigators to go uncorrected. Petitioner presented this *Giglio* claim in his Rule 3.850 motion and presented argument on the issues raised in the claim during the evidentiary hearing.

As the trial court pointed out, only one of the alleged "inconsistencies" in Kumble's statements was not resolved at the time it was made or immediately upon being brought to Kumble's attention prior to the trial – whether he saw glass on the walkway leading to the victim's house on the night following the murder. Dkt. 18, Ex. 4 at 7. Because this issue was presented to the trial court in Petitioner's Rule 3.850 motion and the trial court denied relief, that decision is entitled to deference pursuant to 28 U.S.C. § 2254(d). The trial court heard argument on this issue before finding that he had failed to demonstrate sufficient materiality to warrant relief on his claims.

Thus, the trial court clearly found that Detective Tosi's

testimony did not constitute *a Giglio* violation. This is consistent with federal law. *Cf. Strickler,* 527 U.S. at 289-92 (finding insufficient materiality even where "[w]ithout a doubt, [witness'] testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting [witness] testimony might have changed the outcome of the trial."). *See also Dickerson,* 248 F.3d at 1042 (reject defendant's *Giglio* challenge because the uncorrected, allegedly perjurious statements did not "undermine confidence in the verdict") (citation omitted). Therefore, Petitioner is not entitled to federal habeas relief on this claim.

Contaminated Evidence

Finally, Petitioner alleges that the prosecution presented "false and uncorrected testimony that there was no impropriety with regard to evidence collected from the scene for analysis." Dkt. 14 at *49.* "Presentation [by the state] of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio, 405 U.S.* at 153. Petitioner does not cite to specific testimony in the record. In his petition, however, Petitioner states that "Linda Hensley, a micro analyst, indicated in her deposition that some evidence was not analyzed. Paver asked her why. Hensley's response suggested that another witness had already matched the evidence to someone (R. *3243).* Neither the attending prosecutor, Andrews, nor Hensley, revealed that the real reason was contamination of the evidence." Dkt. *14* at 31. The Court concludes that Petitioner's claim is based on Hensley's allegedly misleading deposition testimony.

On September 16, 1986, Attorney Andringa prepared a memorandum memorializing a telephone conversation during which Hensley advised her that four of nine bags of evidence collected at the murder scene would not be analyzed because they had been opened by someone prior to receipt by the laboratory and were thus considered "contaminated." Dkt. 1, Post-Conviction Proceedings, Vol. *2* at *212.* The memorandum was not given to the defense during discovery. Respondent argued that the fact that four of the nine bags of evidence were not processed as evidence was not withheld from the defense, and the fact that they were contaminated would not have made a difference in the outcome of the trial.

Trial counsel admits that he knew that only five of the nine bags of evidence were analyzed following the Hensley deposition, but

did not use that information. According to trial counsel, "[Hensley] identified the exhibits that had been submitted by the Gulfport Police Department. She identified further, or purported to, what exhibits were actually examined, and identified some exhibits which were not examined." Dkt. 1, Post-Conviction Proceedings, Vol. 21 at 3236; 3240. Trial counsel then explained that he misunderstood Hensley's deposition testimony, stating that "[h]er explanation, as I understood it, was that either Hanlin had identified them to somebody else. And maybe it was inappropriate then to reexamine them, maybe there wasn't a strong match. But she certainly did not tell me, at any time during the course of that deposition, ... that evidence was contaminated." *Id.* at 3243.

Trial counsel claims that, as he understood Hensley's responses during her deposition, she was stating that she had not processed the evidence because someone had already undertaken that task. *Id.* See Dkt. 1, Post-Conviction Proceedings, Vol. 23 at3887-94. Trial counsel also testified that he did recall asking Hensley if the Florida Department of Law Enforcement would perform an analysis on the four "contaminated" bags if the defense were to make such a request. *Id.* at 3895. Although he was told that the tests would be done upon request, according to trial counsel's testimony, he never requested this service. *Id* at 3896.

In addressing this claim, the trial court stated: "I don't know whether M. Paver wasn't asking good questions or whether [Hensley] didn't understand his questions, but it's hard for me to think she was trying to cover up a 'nothing.' And that's what this is, is a 'nothing.' All the defense gets to use this for is one more piece of bungled-up evidence." Dkt. 1, Post-Conviction Proceedings, Vol. 13 at 1957.

Following the hearing, the trial court concluded that "the combined defenses with all the *Brady* evidence does not undermine this court's confidence in the outcome of the case." Dkt. 18, Ex. 4 at 23. *See Kyles,* 514 U.S. at 437. This is the test for materiality under both *Brady* and *Giglio.* See *Dickerson,* 248 F.3d at 1042.

The trial court heard testimony from ten witnesses during the four-day evidentiary hearing, including three state attorneys, three law enforcement investigators, the polygraph examiner, two defense attorneys, and Kumble's former girlfriend. Applying the correct

standard of review as set out in *Brady* and its progeny, the trial court concluding that Petitioner failed to establish that any of the claims he raised, independently or collectively,"put the whole case in such a different light as to undermine confidence in the verdict." *Strickler,* 527 U.S. at 290 (citation omitted). Thus, the trial court's decision is not contrary to or an unreasonable application of clearly established law as enunciated by the Supreme Court or an unreasonable application of the law to the facts of the case. *See* 28 U.S.C. §2254(d). Petitioner has also failed to establish by clear and convincing evidence that the trial court's factual findings are an unreasonable determination of the facts in light of the evidence. See 28 U.S.C. § 2254(e). Accordingly, Petitioner's *Giglio* claims lack merit.

Standard Applied

Finally, referring to the trial court's statement in the conclusion of its order that it remained "confident that there is not a reasonable probability that another trial would produce an acquittal for the Defendant" (Dkt. 18, Ex. 4 at 25), Petitioner asserts that the trial court applied the wrong standard in assessing his claims. The Court finds this argument to be without merit. When the trial court's comment is placed in context with the remainder of the order, it is clear that the trial judge applied the appropriate standard in finding that petitioner failed to meet the materiality prong of the *Brady* test.

The trial court recognized that the analysis of Petitioner's claims was governed by *Brady,* and set out the standard for a *Brady* review, as enunciated in *Kyles,* stating "[i]n assessing *Brady* claims, the court must evaluate the cumulative effect of all the suppressed favorable evidence. However, the *Brady* allegations must first be examined individually before they can be collectively considered." Dkt. 18, Ex. 4 at 1-2. *Kyles* does not preclude a court from examining *Brady* claims individually; it merely requires that where there is more than one alleged *Brady* violation, the materiality assessment be based on an examination of the evidence "collectively."

After meticulously setting out the details of each claim and evaluating them to determine whether they met the first three prongs of the *Brady* test, the trial court examined the claims in terms of admissibility. Dkt. 18, Ex. 4 at 14. The trial court set out the admissibility requirement too narrowly for *Brady* purposes, but this

had no effect on the outcome of the Rule 3.850 proceedings because Petitioner failed to demonstrate that "the evidence — although itself inadmissible — would have led the defense to some admissible evidence." *Williams,* 222 F.3d at 1183.

Finally, the trial court "collectively examine[d] the admissible evidence [to] determine if there is a reasonable probability that the outcome of the proceedings would have been different," defining "reasonable probability" "as a probability sufficient to undermine the court's confidence in the outcome of the case." *Id.* at 20. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles, 514* U.S. at 436. The trial court examined the items collectively, concluding that "the combined defenses with all the additional *Brady* evidence does not undermine this court's confidence in the outcome of this case." Dkt. 18, Ex. 4 at23. The Court finds that the trial court followed the requirements set out in this circuit for evaluating *Brady* and *Giglio* claims. *See United States v. Jordan,* 316 F.3d *1215,* 1251-52 (11th Cir. 2003); *Dickerson,* 248 F.3d at 1042. Petitioner's assertion to the contrary is clearly, without merit.

Conclusion

For the foregoing reasons, the Court finds that Petitioner has failed to establish that he is entitled to federal habeas relief. Any claims or arguments not specifically addressed herein are rejected as lacking merit.

ACCORDINGLY, the Court **ORDERS** that:

1.. The Petition for Writ of Habeas Corpus is **DENIED** (Dkt. 1).

2.. The **Clerk** shall enter judgment against Petitioner, terminate all pending motions, and close this case.

ORDERED in Tampa, Florida, on March 31,2003.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

SA:jsh

Copy to: All Parties of Record

SUPPLEMENTAL APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GEORGE ALAN LEWIS,

Petitioner,

-vs- Case No. 8: 99-cv-2564-T-26TBM

MICHAEL W. MOORE and
ROBERT A. BUTTERWORTH,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus is denied.Judgment is entered against Petitioner, George Alan Lewis.

Date: .March 31, 2003

SHERYL L. LOESCH, CLERK

By: A. Guzman, Deputy Clerk

Copies furnished to:

Counsel of Record
Unrepresented Parties